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## The Establishment Clause as a Structural Restraint on Governmental Power

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# The Establishment Clause as a Structural Restraint on Governmental Power

Carl H. Esbeck\*

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## I. INTRODUCTION

This Article inquires into whether the singular purpose of the Establishment Clause<sup>1</sup> is to secure individual rights, as is conventionally believed, or whether its role is more properly understood as a structural restraint on governmental power. If the Clause is indeed structural in nature, then its task is to negate from the purview of civil governance all matters "respecting an establishment of religion." Conceptualizing the role of the Establishment Clause as either rights-securing or structural has profound consequences for the nation's constitutional settlement concerning the interrelationship of government and religion.

The distinction between rights and structure within the overall Constitution is commonplace.<sup>2</sup> For government to avoid violating a right<sup>3</sup> is a

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1. The Establishment Clause, combined with the Free Exercise Clause, reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

2. See, e.g., DAAN BRAVEMAN ET AL., *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* at v-vi, 53-60, 193, 257, 365-66 (3d ed. 1996) (making distinctions between individual rights and the overall structure of the Constitution); GERALD GUNTHER, *CONSTITUTIONAL LAW* at xxxi - xxxv (12th ed. 1991) (devoting chapters 2-6 to governmental structure and chapters 7-15 to individual rights); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 2-1 to -4, at 18-22 (2d ed. 1988) (outlining the interplay between the structure of the Constitution and substantive rights); see *id.* § 7-1, at 546 (noting the limited protection for personal rights in the original body of the Constitution, except indirectly through the structuring of a government with limited enumerated powers).

3. The terms "individual rights" and "personal rights" are used interchangeably in this Article. Moreover, as used herein, individual or personal rights are akin to "group rights" of a church or other religious entity where the entity has organizational standing to assert a rights claim on behalf of its collective membership pursuant to the three-part test set out in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3, at 103-04 (2d ed. 1994) (explaining the Court's

matter of constitutional duty owed to each individual within its jurisdiction. On the other hand, for government to avoid exceeding a structural restraint is a matter of limiting its activities and laws to the scope of its powers. While individual rights can be waived, structural restraints cannot.<sup>4</sup> The distinction manifests itself in subtle but often useful ways that can prove definitive.<sup>5</sup> A structural clause, to be sure, can have a laudable effect on individual rights by constraining the branches of government to act only within the scope of their delegated powers.<sup>6</sup> Nevertheless, the immediate object of the Constitution's structure is the management of power: a dividing, dispersing, and balancing of the various prerogatives of national sovereignty. "Separation of powers" and "federalism" are mere shorthand for familiar forms of constitutional structure running horizontally and vertically, respectively, within the three-branch federal government and the multi-layered system of national, state, and local governments. Structural clauses are helpfully thought of as power-conferring and power-limiting, so long as it is understood that many such clauses serve both functions.<sup>7</sup>

This Article will show that the Supreme Court's case law is more easily

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test in *Hunt*). The common feature of individual rights and group rights is that in both instances there is no violation of a constitutional right in the absence of a showing of personal "injury in fact." The violation of a structural clause need not be so attended. For further discussion, see *infra* text accompanying notes 127-33.

As used in this Article the term "group" is a collection of individuals with a common cause. When a group (association, institution, organization, society) is imbued with certain formalities we recognize them as jural entities. For discussion on whether there are group rights for a religious entity over and above the aggregated individual rights of the entity's membership, see *infra* notes 210-23 and accompanying text.

4. *Clinton v. City of New York*, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring) (stating that structural clauses cannot be voluntarily surrendered, yielded up, or abdicated by Congress); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982) (contrasting personal jurisdiction as an "individual liberty" that can be waived, with a structural limitation that is a "restriction on . . . power . . . as a matter of sovereignty" and thus cannot be waived).

5. See, e.g., *Dennis v. Higgins*, 498 U.S. 439 (1991) (holding that the Dormant Commerce Clause is a rights-securing clause rather than a power-limiting clause of the Constitution, and thus actionable under 42 U.S.C. § 1983); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989) (holding that the Supremacy Clause is not a rights-securing clause, but a clause requiring that federal law prevail when there is a conflict with a law based on state power, and thus not actionable under 42 U.S.C. § 1983); *id.* at 116 (Kennedy, J., dissenting) (distinguishing a constitutional right from "those interests merely resulting from the allocation of power" between government entities).

6. See *Printz v. United States*, 117 S. Ct. 2365, 2378 (1997) (explaining how individual liberty flows consequentially from the Constitution's structure); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (explaining how structure has the object of preventing the accumulation of excessive power in any single government or branch thereof, and the successful achievement of that object instrumentally ensures the protection of fundamental liberties); see also *infra* notes 442-44 and accompanying text (discussing the symmetry between structure and rights).

7. The Commerce Clause, for example, both confers power on Congress, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (upholding federally issued coasting license in the face of a state-granted steamboat monopoly), and sets limits on that power, see *Lopez*, 514 U.S. at 550 (striking down federal law criminalizing possession of firearms near schools).



understood when the Establishment Clause is conceptualized as a structural<sup>8</sup> restraint on the government's power to act on certain matters pertaining to religion.<sup>9</sup> In 1947, the Supreme Court handed down *Everson v. Board of Education*,<sup>10</sup> which made the Clause applicable to the actions of state and local governments via the incorporation doctrine.<sup>11</sup> Since *Everson*, the Court has sub silentio given the Establishment Clause a far different application than if its object were to guarantee individual religious rights. The Court has done this (seemingly intuitively rather than by grand design) by applying the Establishment Clause as if it works as a structural restraint on government. As a separate and secondary point, the argument in this Article is that the Court has been correct in doing so, albeit other mistakes have been made along the way.

The Supreme Court's incorporation of the Establishment Clause in *Everson*, as well as its application a year later in *McCollum v. Board of Education*,<sup>12</sup> did not pass without early resistance. Objections arose from a chorus of voices: historians, aware that federalist concerns so prominent in the First Congress were being ignored;<sup>13</sup> defenders of justiciability doctrine,

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8. Mere placement in what is popularly called the Bill of Rights does not foreclose the possibility that the Establishment Clause is a structural restraint on governmental power rather than an individual right. The Ninth Amendment, for example, does not create rights but merely acknowledges the existence of rights other than those specifically enumerated. Likewise, the Tenth Amendment does not create rights but makes explicit what is implicit in the original constitutional document: that the newly created central government is one of limited, delegated powers. It cannot easily be denied that the Establishment Clause is different from the rest of the Clauses in the first eight Amendments. Justice Brennan took note of the matter this way:

Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of *government* in the society that we have shaped for ourselves in this land.

*Marsh v. Chambers*, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting).

9. The Establishment Clause describes the powers that are restrained as the making of laws "respecting an establishment of religion." The powers that fall within the scope of that phrase (denied to government, hence within the province of religion) and the powers outside that phrase (hence, residing in the civil government) await elaboration below. See *infra* Part VII.B.

10. 330 U.S. 1 (1947).

11. See *id.* at 8, 14-15 (applying the incorporation doctrine to the Establishment Clause). *Everson* narrowly upheld a state law permitting local authorities to reimburse parents for the cost of transporting their children to primary and secondary schools, including church-related schools.

12. 333 U.S. 203 (1948). In *McCollum*, the Court struck down as violative of the Establishment Clause an Illinois school district's practice of offering elective classes in religion. The Establishment Clause had been a part of the Constitution for 157 years when the *McCollum* Court found, for the first time, that the Clause was violated.

13. See *infra* notes 51-60, 91-92 and accompanying text (describing the Clause's vertical restraint on Congress and reactions to *Everson*).

puzzled because standing limitations were being overlooked;<sup>14</sup> and theologians, worried that the Court was interpreting the no-establishment principle as imposing an article of religious faith on the nation, one at odds with the beliefs of their own ecclesiastical communities.<sup>15</sup> These very disparate objections had one common thread: disagreement over whether the Establishment Clause should be viewed as structural in nature.

The Supreme Court's view of the Establishment Clause as structural can be most easily glimpsed by the manner in which the Court carved out an exception to the law of standing. The Court generally requires "injury in fact" of a rights claimant in order to have standing to sue.<sup>16</sup> Contrariwise, the Court denies standing when the claimant can show no more than a "generalized grievance," meaning that the plaintiff's asserted interest is no more than that shared by most everyone desiring to live under a government that itself obeys the law.<sup>17</sup> In cases pleading a no-establishment claim, however, the Court dispensed with the requirement that the plaintiff show concrete "injury in fact,"<sup>18</sup> lest laws putatively unconstitutional are, nonetheless, insusceptible to challenge in the courts. This relaxation of standing would be unnecessary if the Court regarded the Establishment Clause as only securing individual rights, for the violation of a rights clause will in due season produce a complainant with a concrete injury. The alteration of the rules on standing to permit the filing of this type of non-Hohfeldian claim<sup>19</sup> is a clear sign that the Court views the Establishment Clause as a

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14. See *infra* text accompanying notes 17-19, 148-51 (describing the Court's treatment of standing in no-establishment cases and the reaction of scholars).

15. See *infra* text accompanying notes 100-12 (describing John Courtney Murray's view of the Establishment Clause).

16. See *infra* notes 124-26 and accompanying text; see generally CHEMERINSKY, *supra* note 3, § 2.3.2, at 58-61.

17. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (denying standing to plaintiff who claimed that the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2, prohibits members of Congress from holding an office in the executive branch); *United States v. Richardson*, 418 U.S. 166 (1974) (denying standing to plaintiff who claimed that the Account Clause, U.S. CONST. art. I, § 9, cl. 7, requires Congress to disclose receipts and expenditures of all public monies); *Ex parte Levitt*, 302 U.S. 633 (1937) (denying standing to plaintiff who claimed that the Incompatibility Clause prohibits a member of Congress from accepting an appointment in the judicial branch "the Emoluments whereof" having been increased during the member's congressional term).

18. See *infra* text accompanying notes 134-47 (describing the Court's treatment of standing in Establishment Clause cases).

19. Claims that are not personal to an individual or association of individuals are referred to as "non-Hohfeldian." See, e.g., *Flast v. Cohen*, 392 U.S. 83, 119 n.5 (1968) (Harlan, J., dissenting); Richard Fallon, *Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 3 & n.12, 4 (1984). Alternative phrases used to convey a similar meaning are "public-interest" actions, "ideological" claims, and "collective constitutional rights." Usage of the term "non-Hohfeldian" persists because the substitutes have multiple and hence unclear meanings. The term comes from a venerable article setting forth several types of legal rights. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Professor Hohfeld's article has a catalogue of individual and proprietary rights. Hence, when a claim is not personal to a specific plaintiff or association of plaintiffs, but an action in the public interest brought in a representative

structural restraint.

An examination of the nature of the remedies the Supreme Court awards in successful Establishment Clause cases reinforces the foregoing observation concerning standing. Remedies tailored to relieving plaintiffs of injuries actually suffered are indicative of an individual rights clause. This is not the pattern in no-establishment cases, where courts have enjoined government from acting in an entire field of concerns deemed to be in the exclusive province of religion.<sup>20</sup> The class-wide and impersonal nature of these injunctions suggests a clause whose function is negating the power of government, not the offering of relief tailored to the injuries of the complainants actually before the court.<sup>21</sup>

Examining the Court's dismissals for lack of subject matter jurisdiction further reveals the Supreme Court's view of the Establishment Clause. Such dismissals happen when a court is asked to resolve disputes on topics over which the court deems itself as having no competence.<sup>22</sup> These dismissals occur in a line of cases involving such issues as church schisms over doctrine, ecclesiastical polity, and removal of a cleric from office.<sup>23</sup> Dispositions for lack of jurisdiction presuppose that civil courts are without power to even reach, let alone adjudicate, the matter on the merits. Once again the no-establishment principle is tacitly applied as a power-limiting clause. Conceptualizing the Establishment Clause as structural not only explains why courts determine they do not have subject matter jurisdiction in these cases, but it has the added benefit of integrating the church schism cases, often regarded as a discrete and rather odd line of precedent, into a larger general conception of the Clause.<sup>24</sup>

Another reason for viewing the Supreme Court's application of the Establishment Clause as structural is that it solves the "two-definitions puzzle." The Court has implicitly adopted two definitions of religion, one for

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capacity, it is called "non-Hohfeldian."

20. For example, public school officials have been found to have no power to read or compose prayers for group recitation, *Lee v. Weisman*, 505 U.S. 577, 599 (1992); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962), conduct Bible devotions before classes of students, *Schempp*, 374 U.S. at 223, offer classes in religious training, *McCullum v. Board of Educ.*, 333 U.S. 203, 231 (1948), or display religious codes for public veneration, *Stone v. Graham*, 449 U.S. 39, 42 (1980) (*per curiam*). Concerning each of these matters within the purview of religion, the breadth of the Court's order was to enjoin governmental power from acting on the matter in question when a more narrowly tailored injunction was available that would relieve complainants of their constitutional injury. *Cf. West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that Jehovah's Witnesses children could not be compelled to salute the U.S. flag and recite a pledge of allegiance at the beginning of the school day, but remedy awarded was a narrow right to opt out while remaining in the classroom).

21. See *infra* text accompanying notes 154-62 (describing the class-wide nature of remedies the Court awards in no-establishment cases).

22. See *infra* text accompanying notes 163-68.

23. See *infra* notes 172-75 and accompanying text.

24. See *infra* text accompanying notes 224-29.

the Establishment Clause and another for the Free Exercise Clause.<sup>25</sup> This is puzzling because the word "religion" appears only once in the text of the First Amendment, applicable to both Clauses.

A now common urban conflict illustrates the problem of using two distinct definitions for religion. Assume a group of parishioners opens a shelter for the homeless operated out of the basement of its church. Religion as such gets only collateral mention at the shelter, the primary ministrations being food, a shower, a bed, clean clothes, and kindness. When faced with a municipal order to cease operations for noncompliance with zoning ordinances, the church responds by asserting that the shelter's operation is protected by the Free Exercise Clause because the work is an outgrowth of religious belief. The claim is obviously plausible and, if sincere, will be recognized by the courts as satisfying one of the threshold requirements for stating a claim by coming within the Free Exercise Clause's definition of "religion."<sup>26</sup> Assume that a month later the city adopts social welfare legislation opening several homeless shelters for operation by the municipality. Is the city now "establishing" religion by its engagement in religious activity? Common sense says "no," yet how can the identical activity be religious when carried out by the parish church but not religious when performed by the municipality?<sup>27</sup> The Supreme Court's response, without specifically saying so, has been that the same activity is religious for purposes of the Free Exercise Clause but not religious for purposes of the Establishment Clause.<sup>28</sup>

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25. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 828 (1st ed. 1978); William W. Van Alstyne, *Constitutional Separation of Church And State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865, 873-75 (1963); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WISC. L. REV. 217, 265-67. But cf. TRIBE, *supra* note 2, § 14-6, at 1186 n.53 (criticizing the two-definitions approach advocated in the first edition).

26. Ultimately the church may very well not prevail on the merits, see *infra* note 435, but that is beside the point for purposes of this illustration.

27. This illustration is not explained away by simply arguing that there are two purposes for operating the shelters (one religious, the other secular), not two definitions of religion. The government does not circumvent the Establishment Clause simply by averring a secular purpose behind its actions. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *Epperson v. Arkansas*, 393 U.S. 97 (1968). Nor does the government circumvent the Establishment Clause by persuading a court that its purpose is secular. Many a statutory scheme, notwithstanding a judicial finding of a secular purpose, has fallen to the Clause because the statute had the effect of advancing religion or unduly entangling itself therewith. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Another suggestion is that the problem can be "solved not by defining 'religion' narrowly for establishment clause purposes, but rather by defining narrowly what constitutes 'establishment.'" KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 468 (1999). This, too, is an unsatisfactory solution to the illustration. No one really believes that the city's operation of the shelter is "doing religion" but religion that nonetheless falls short of "an establishment" thereof. Rather, we intuitively believe the city's operation of the shelter is secular, and our instincts in that regard are surely correct.

28. For example, Sunday-closing statutes were regarded as secular labor laws for Establishment Clause analysis in *McGowan v. Maryland*, 366 U.S. 420, 442-45 (1961), but a Sunday

Jurists critically examining the two-definitions approach have found it an unsatisfactory hermeneutic.<sup>29</sup> However, the Court's approach is not objectionable—indeed, it seems naturally to follow—when the Establishment Clause is conceptualized as structural. The logic is tied to the difference in tasks between a structural clause and a rights clause. For a rights clause to succeed in the task of securing personal religious liberty, the political majority must be compelled to adjust its police power objectives to the needs of the religious minority or religious nonconformist. Thus, the Free Exercise Clause's meaning of "religion" is necessarily broad to account for the vast differences in human belief, the Framers fully appreciating that human hearts vary widely in spiritual matters.

In contrast, the task of a structural clause is to manage sovereign power. America's religious pluralism virtually guarantees that legislation, even when nondiscriminatory in both text and purpose, will have disparate effects across the spectrum of religions dotting the land. When these unintended effects occur, the resulting burden on some religions but not others cannot force an invalidation of the law due to the legislation exceeding the government's power, that is, exceeding a structural restraint.<sup>30</sup> This follows because intrinsic to the structure of a written constitution is that the powers

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day of rest was religious for purposes of the Free Exercise Clause in *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989). Likewise, a law restricting access to abortion was regarded as secular for purposes of the Establishment Clause in *Harris v. McRae*, 448 U.S. 297, 319-20 (1980), but a woman having unrestricted access to abortion was a matter of a religious conscious for purposes of Free Exercise Clause analysis, *id.* at 320-21.

29. In *Everson v. Board of Education*, 330 U.S. 1 (1947), Justice Rutledge wrote of the text of the First Amendment:

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

*Id.* at 32; see also *Malnak v. Yogi*, 592 F.2d 197, 210-13 (3d Cir. 1979) (Adams, J., concurring in the result) (rejecting the two-definitions approach); *TRIBE*, *supra* note 2, § 14-6, at 1186 n.54 (collecting authorities).

30. The Establishment Clause is not violated merely because a law, neutral in purpose, has an unintended effect on a particular religion or religious practice. See *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (holding IRS regulation concerning deductibility of contributions having unintended impact on religious groups that rely on sales of goods or services as means of fund raising is not violative of Establishment Clause); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (finding that preference for religions whose tenets do not oppose interracial marriage was the unintended effect of neutral IRS regulation about racially discriminatory schools, hence the regulation did not violate the Establishment Clause); *Harris*, 448 U.S. at 319-20 (regarding a law restricting access to abortion as secular for purposes of the Establishment Clause); *McGowan*, 366 U.S. at 442-45 (regarding Sunday-closing statutes as secular labor laws for Establishment Clause analysis); see also *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (distinguishing laws that intentionally discriminate among religions and are thereby unconstitutional from laws that have disparate impact on certain religions and thus do not violate the Establishment Clause).

delegated to (and withheld from) government remain fixed or constant. Hence, a structural clause cannot be seen as varying case-by-case in the scope of its delegation (or negation) to adjust for the individual needs of religious nonconformists.<sup>31</sup> If the Establishment Clause is structural, then any such definition of "religion" would have to remain fixed and thereby help demarcate the boundary at which the government's power comes to an end and the purview of religion begins.

Moreover, any definition for no-establishment purposes has to be narrow in order not to overturn social welfare and moral-based legislation. The case law confirms that this is indeed how the Clause has been applied. The Supreme Court has said that legislation does not violate the Establishment Clause just because the law has a disparate effect (beneficial or detrimental) on particular religions.<sup>32</sup> To the Court, it is sufficient that the legislation has, *inter alia*, a secular purpose, with the question of what is secular being answered using a narrow, fixed definition of "religion." In summary, the difference in function of the two Religion Clauses—free exercise is a right and no-establishment is a structural restraint—is what causes the Supreme Court to have a broad, flexible definition of religion for the Free Exercise Clause and a narrow, fixed definition for the Establishment Clause.

Solving these doctrinal riddles (standing exceptions, class-wide remedies, jurisdictional dismissals, and the two-definitions puzzle) validates the principal thesis of this Article, namely that the Court has applied the Establishment Clause as structural.<sup>33</sup>

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31. Any structural boundary that sets limits on the government's ability to act or pass laws has to be drawn in a manner that deals uniformly with all persons and all faiths, that is, without regard to religion or lack thereof. If this was not so, the church-state boundary would be in constant flux. A fixed boundary can be accomplished only if the definition of religion remains fixed.

It would take a rights-based clause to trump otherwise valid legislation, and thereby force the government to adjust its police power case-by-case to accommodate the personal needs of religious nonconformity. This was the stated law of the Free Exercise Clause until it was overturned in *Employment Division v. Smith*, 494 U.S. 872 (1990). See *infra* note 435; see also *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down congressional legislation that had sought to restore free exercise law as it existed before the *Smith* decision). Because the Establishment Clause operates independently of the Free Exercise Clause, see *infra* text accompanying notes 441-46, and the focus here is on the former Clause, there is no need to take a position in this Article on whether *Smith* was correctly decided.

32. See *supra* note 30.

33. A few commentators have noted in passing that the no-establishment principle is a structural or power-limiting clause rather than a rights clause, but they then leave the idea undeveloped. See REX E. LEE, *A LAWYER LOOKS AT THE CONSTITUTION* 129 (1981) (stating that the Establishment Clause "deals with structural matters, specifically the relationships between government and religious institutions or religious movements"); BERNARD H. SIEGAN, *THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY* 118 (1987) (stating that the Establishment Clause is a limitation on the powers of government being used to authorize the financing and supporting of religious programs); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 373, 392-93, 406 (stating that the Establishment Clause places a political duty on the federal government); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist*

An important consequence of attributing structural characteristics to the Establishment Clause is that it acknowledges the existence of a competency centered in religion that is on a plane with that of civil government.<sup>34</sup> Stated differently, the Establishment Clause presupposes a constitutional model consisting of two spheres of competence: government and religion.<sup>35</sup> The subject matters that the Clause sets apart from the sphere of civil government—and thereby leaves to the sphere of religion—are those topics “respecting an establishment of religion,” e.g., ecclesiastical governance,

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*View*, 105 HARV. L. REV. 1700, 1710 (1992) (stating that the Establishment Clause is not an individual liberty, but is a structural limit upon federal power and a reservation of authority to the states).

34. William Clancy aptly framed the matter this way:

[T]he “wall of separation” metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a “wall” but a logical distinction between two orders of competence. Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God’s. (Surely this is one of history’s more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.

William Clancy, *Religion as a Source of Tension*, in RELIGION AND THE FREE SOCIETY 23, 27-28 (1958).

Max L. Stackhouse goes on to note just how remarkable it is that a government should go beyond the protection of the rights of religious individuals and intentionally limit its sovereignty by acknowledging a co-equal authority, an authority outside the state’s control when it comes to religious matters:

[The First] amendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself . . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This is not only an affirmation of the freedom of individual belief or practice, not only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.

Max L. Stackhouse, *Religion, Rights, and the Constitution*, in AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990).

35. In some respects the Court wields the Clause in a manner similar to a separation-of-powers provision. Professor Garvey has stated: “[The Establishment Clause] speaks about relations between institutions, not between individuals and government . . . . The clause thus regulates affairs between government and the churches, much as the original Constitution regulates affairs between government and the states.” John H. Garvey, *A Comment on Church and State in Seventeenth and Eighteenth Century America*, 7 J.L. & RELIGION 275, 278 (1989). However, neither a Separation-of-Powers Clause nor a federalism provision is an entirely apt analogy to the Establishment Clause. Separation-of-powers and federalism clauses restrain the various branches of government on both sides of a boundary. The Establishment Clause, in contrast, polices only the government on the boundary between government and religion. See *infra* note 44 and accompanying text.

the resolution of doctrine,<sup>36</sup> the composing of prayers, and the teaching of religion.<sup>37</sup>

The Court's reluctance to openly acknowledge that it views the Establishment Clause as structural has caused legal doctrine to appear muddled,<sup>38</sup> thereby making the Court's holdings uncommonly vulnerable to criticism.<sup>39</sup> More importantly, to continue to ignore the differences in juridical tasks between a rights-securing clause and a power-limiting clause is to obscure the search for the proper scope of the Establishment Clause. For example, courts are increasingly confronted with supposed "collisions" of the Establishment Clause with other Clauses in the First Amendment that force them to subordinate one Clause to give the other full play.<sup>40</sup> This makes no sense. Putting the Establishment Clause at war with the Free Exercise and Free Speech Clauses suggests that the Framers drafted a consti-

36. See *infra* notes 172-75.

37. See *supra* note 20.

38. Since the *Everson* decision in 1947, Justices on the Supreme Court have proposed all manner of verbal formulae as encapsulating the prohibitions of the Establishment Clause. Among them are a coercion test, *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), a nonpreferentialism test, *Wallace v. Jaffree*, 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dissenting), a no-endorsement test, *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), and a purpose-effect test, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963), that later acquired a third element called "no-entanglement," *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), only to have that entanglement element apparently absorbed back into the effect element, *Agostini v. Felton*, 521 U.S. 203 (1997). These judge-made tests have proved to be of little use in predicting how actual cases before the Court will be decided, as well as to be of limited durability, as the test in current favor waxes and wanes even among individual Justices.

39. Professor Gedicks has collected commentary from fellow law professors:

The Court's decisions in this area have been described as "ad hoc," "eccentric," "misleading and distorting," "historically unjustified and textually incoherent," and finally "riven by contradiction and bogged down in slogans and metaphors." . . . Steven Smith has observed that "in a rare and remarkable way, the Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment clause doctrine is seriously, perhaps distinctively, defective."

FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* 1 (1995) (footnotes omitted).

40. See, e.g., *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996); *Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995). The appeals court in *Church on the Rock* struck down a congressional prohibition on private religious speech thereby permitting access to senior citizen centers funded by the federal government. Community groups were welcomed at the center. A local church sought the same access to conduct worship services for the residents. The government unsuccessfully argued that denial of the church's right under the Free Speech Clause was required by the Establishment Clause. In *Hartman*, the appeals court analyzed a U.S. Army program that paid local providers for child care services selected by service personnel. However, program regulations disallowed payments to faith-based child care providers. The regulation was struck down as violative of the Free Exercise Clause. The government unsuccessfully argued that the discrimination against the free exercise of religion by service personnel was required by the Establishment Clause.



tutional Amendment that contradicts itself.<sup>41</sup> A major cause of this imagined "tension" is the uncritical assumption that the Establishment Clause is rights-based. If the object of that Clause really was to secure a freedom *from* religion (and the Free Exercise Clause doubtlessly secures some right to exercise religion) then of course the two Clauses would frequently be found on a collision course.<sup>42</sup> These "battles of the Clauses" would not occur if the Establishment Clause were openly acknowledged as structural.<sup>43</sup>

Part II of this Article examines the text of the Establishment Clause and revisits the manner in which the First Congress wove into its fabric two ordering principles: first, the vertical dimension between national and state governments; and, second, the horizontal dimension between the new national government and religion. The least strained reading of the text, as well as a natural and plausible interpretation of the sociopolitical context that gave rise to the Clause in 1789-1791, points to no-establishment as structural along both these dimensions.

Part III jumps to 150 years later and explores what transpired when the Establishment Clause was incorporated through the Fourteenth Amendment. It was at this juncture that the structural dimension of national government-state governments was dropped out of the Clause, whereas structure along the dimension of national government-religion was expanded to cover state and local governments as well. Part IV takes up the subjects of standing, scope of remedies, church autonomy cases, and the nondelegation rule. Each is shown to be a lens through which the Supreme Court unmistakably applies the Establishment Clause as structural.

If taken as given that the Supreme Court views the Establishment Clause as structural, then the Clause's primary role is to police the boundary between government and religion looking to arrest overreaching by government, whether national, state, or local.<sup>44</sup> Part V relates in the Court's

41. See *infra* notes 361-63, 365-68, 384-87 and accompanying text.

42. Alexander Meiklejohn has noted the analytical difficulty when a single constitutional Clause tries to do service as both protecting personal religious liberty and affording a freedom from religion. "[A]ll discussions of the First Amendment are tormented by the fact that the term 'freedom of religion' must be used to cover 'freedom of nonreligion' as well. Such a paradoxical usage cannot fail to cause serious difficulties, both theoretical and practical." Alexander Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROBS. 61, 71 (1949).

The analytics of the problem still leads modern scholars into thinking that the "tension" between the Free Exercise and Establishment Clauses is inherent and irreconcilable. See, e.g., Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 123-25, 129-30. However, when "freedom from religion" is removed from the Establishment Clause side of the ledger as a personal right, the "tension" falls away. Such a move does not leave "freedom from religion" without constitutional protection. It does mean, however, that "freedom from religion" is protected as a by-product of the structural limitation on governmental power laid down by the Establishment Clause.

43. See *infra* notes 414-17 and accompanying text.

44. As with all legal "negatives" found in the Bill of Rights, the Establishment Clause does not act as a limitation on what private individuals, churches, or other religious organizations may do. The Clause polices only the government. Richard John Neuhaus has written:

own words its explanation for fixing that boundary where it does. The oft-stated rationale is two-fold: to avoid governmental interactions with religion that cause either a fracturing of the body politic (the *civitas*) along religious lines,<sup>45</sup> or an undermining of the integrity of religion (*religare*)<sup>46</sup> or religious organizations (the *ekklesia*).<sup>47</sup> Neither of these two injuries, to the

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The religion clause of the First Amendment is entirely a check upon government, not a check upon religion. Even if a particular religion were to agitate successfully to have itself officially established, it is the government that would have to do the establishing. And that is what the government is forbidden to do. As wrongheaded as it would be, religions are perfectly free to agitate to have themselves established, for that too is part of religious freedom. What is prohibited by the First Amendment is the [use] of government power in giving in to such agitations . . . . The religion clause is not then, as some claim, a check upon both government and religion, nor is it a provision in which two clauses are to "balanced" against one another. The religion clause is not to protect the state from the church but to protect the church from the state. Similarly, in press-state relations, the First Amendment is not to protect the state from the press but to protect the press from the state. The "great object" of the Bill of Rights, [James] Madison most explicitly said when introducing his draft to the House [of Representatives], was to "limit and qualify the powers of Government."

Richard John Neuhaus, *Establishment is Not the Issue*, in 4 THE RELIGION & SOCIETY REPORT 1, 3 (June 1987).

45. These harms are of the type often associated with England and Continental Europe during the religious conflicts that followed from the Reformation. See Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1049-66 (1996) (summarizing the religious wars of post-Medieval England and Continental Europe, as well as the motives of the primary actors, both political and religious). That subject is explored at *infra* notes 401-02 and accompanying text.

It is the government's official actions causing political strife along sectarian lines that rise to an Establishment Clause harm, not the resulting private actions of citizens reflecting such division or strife. No-establishment does not limit such private actions, only governmental actions. See *supra* note 44. Indeed, these private actions are likely protected by the Free Speech Clause as citizens make their opinions known in the public square. The subject is explored at *infra* notes 364-75 and accompanying text.

46. "Religion" derives from the Latin *religare*, which means "to bind." XIII THE OXFORD ENGLISH DICTIONARY 568 (2d ed. 1989).

47. *Ekklesia* is the Greek word for a gathering of persons who were called out from the larger society for a specified purpose. *Ekklesia* comes from *ek* meaning "out of" and *klesis* meaning "a calling." *Ekklesia* is translated into English as "church." The word was used in early New Testament writings to denote an assembly or gathering. As such, *ekklesia* was preceded by an adjective like "believers" or "saints" to indicate an assembly of Christians. The adjective was dropped in later New Testament writings. This is taken as indicating that usage of the noun *ekklesia*, when appearing in the absence of a modifying adjective, came to mean an assembly of Christians.

*Ekklesia* was used in the New Testament writings in two senses. One sense was as a reference to a church at a specific geographic location, as in "the church at Corinth." In its second sense, *ekklesia* was a reference to the world-wide church comprised of Christians. The word was not used to refer to a building where worship took place. DAVID L. SMITH, ALL GOD'S PEOPLE: A THEOLOGY OF THE CHURCH 242-46, 320-39 (1996); VINE'S EXPOSITORY DICTIONARY OF NEW TESTAMENT WORDS 85-86 (W.E. Vine ed., 1985); THE ZONDERVAN PICTORIAL BIBLE DICTIONARY 170-71 (Merrill C. Tenney ed., 1963).

In this Article *ekklesia* is used in both senses. I additionally use the term to refer to not

*civitas* or to *religare/ekklesia*, is a personal or individualistic harm. Rather, the harms are to collective or class-wide interests that are non-Hohfeldian in character.<sup>48</sup> The prevention of such harms is the expected focus of a constitutional Clause that is structural as opposed to rights-based. Part VI begins to sort out where that clarification leads. The Free Exercise Clause, as a safeguard of individual rights, is differentiated from the Establishment Clause in Part VII. That Part then concludes with the Court's division, one rooted in the Western tradition as received on this side of the Atlantic and uniquely altered here, between those topics within the province of civil government and those matters that remain in the exclusive sphere of religion. It is the "sphere of religion" matters that the Establishment Clause negates as proper objects of governmental power.

## II. THE ARCHITECTURE OF THE ESTABLISHMENT CLAUSE

From the time of its ratification by the states, the Establishment Clause worked as a dual restraint on national sovereignty.<sup>49</sup> The use of the double-

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only Christian assemblies world-wide, but also the congregations and confessional communities of all religions. Finally, I include in the meaning of *ekklesia* religious groups and organizations that are consciously religious but do not claim to be a church in the narrow sense of an organization attended by clergy and performing worship, sacramental, and sacerdotal functions. These latter groups are sometimes call "parachurch" organizations. Familiar parachurch organizations are faith-based colleges, charities, health care organizations, religious publishing houses, evangelistic associations, and mission societies.

48. See *supra* notes 17, 19; *infra* note 442. Because the interest in not having government undermine the integrity of religion is non-Hohfeldian, no religious harm need befall a specific individual for there to be a transgression of a structural restraint. Where there is no personal religious harm, the Free Exercise Clause affords no remedy. See *infra* note 436 and accompanying text. However, in the Court's view the Establishment Clause does afford a remedy for this class-wide interest in religion remaining uncorrupted by too close a tie with government. See *infra* notes 293-307 and accompanying text. In summary, the Free Exercise Clause alone grants a remedy for personal religious harms, but the Establishment Clause—in its task of limiting governmental power—does protect religion from being undermined by the civil state. In this sense, then, it is proper to say that the Establishment Clause is about protecting, *inter alia*, religious liberty. But the religious liberty protected by the Establishment Clause is not individualistic or specific to any one person, but non-Hohfeldian in character.

Some commentators are puzzled that the Court invokes the Establishment Clause to protect class-wide religious interests. See *infra* note 256. They assume that the job of protecting religion is exclusively that of the Free Exercise Clause, and they attribute to the Establishment Clause the sole task of keeping religion in check. But if the Establishment Clause is structural, its task of limiting governmental power redounds to the benefit of all in civil society who enjoy the blessings of a constitutional democracy, see *infra* notes 282-92 and accompanying text, including religion not being compromised by government, see *infra* notes 293-307 and accompanying text.

49. To those approaching the text of the Establishment Clause, historian Thomas J. Curry offers sage advice concerning the state of mind of those now revered as the Framers:

In endeavoring to determine the exact significance [the First] Congress and the [ratifying] states attached to the opening segment of the First Amendment, one must bear in mind the overall context of its enactment and ratification. Its guarantees did not represent the triumph of one particular party or specific viewpoint over a clear or entrenched opposition, but rather a

edged word "respecting" in the Clause had the effect of denying to the new central government the power to make laws in two dimensions: a *state* (or vertical) restraint and a *national* (or horizontal) restraint. Keeping distinct these two dimensions is important because only the horizontal restraint survives today.<sup>50</sup>

The vertical restraint on the power of the new central government was that Congress<sup>51</sup> could not enact legislation operable at the *state* level on certain matters pertaining to ("respecting") religion.<sup>52</sup> Because "mak[ing] . . . law respecting an establishment" was a power denied to Congress, the new central government was without competence to abolish state religious establishments. Likewise, the national government was without power to undo state laws that had earlier disestablished a church. The Second Congress, consequently, could have no more disestablished the Congregational Church in the parishes of Connecticut than it could have re-established the

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consensus of Congress and nation . . . .

Americans in 1789 . . . agreed that the federal government had no power in [religious] matters, but some individuals and groups wanted that fact stated explicitly. Granted, not all the states would have concurred on a single definition of religious liberty; but since they were denying power to Congress rather than giving it, differences among them on that score did not bring them into contention.

. . . The fact that Congress was not trying to resolve concrete disputes, but merely strengthening safeguards against possible future adversity, helps explain at least some of the inattentiveness and absentmindedness attendant upon Americans' enactment of the First Amendment.

THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 1791-1803* (1986) (footnotes omitted).

50. See *infra* text accompanying notes 89-98. Some scholars have noted only the vertical dimension, thus overlooking the horizontal dimension. See, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 25-27 (1995) (arguing that the First Amendment Religion Clause was purely a federalist decision); Note, *supra* note 33, at 1704 (arguing that the Framers of the Establishment Clause sought only to preserve the sovereignty of the states over religion).

51. Because the text of the First Amendment is specifically addressed to "Congress," it might be asked whether the Establishment and Free Exercise Clauses were intended to bind only Congress and not the Executive and Judicial Branches of the new central government. For a closely reasoned argument concluding that all three branches were intended to be equally bound by the Religion Clauses, see Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 371-76 (1994-95); see also EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 104 (1957) ("It seems likely that the reference to Congress was meant to contrast the powers of that body with those of the state governments, rather than with those of other branches of the federal government.").

52. The word "respecting" in the Establishment Clause is synonymous with "pertaining to" or "concerning." ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 9 (1982); DANIEL L. DREISBACK, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* 79-80 (1987). Chief Justice Burger was mistaken when, without any authority, he remarked that "respecting" meant "a step that could lead to" an establishment. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1973).

The difficult task of determining the precise topics that fall within the meaning of the phrase "respecting an establishment of religion"—and hence the subject matter placed out of the reach of the government's power—is addressed *infra* Parts VI and VII.B

Anglican Church in Virginia.<sup>53</sup>

The vertical restraint was born of federalism,<sup>54</sup> a concern that the new national government be kept from intermeddling in a matter that was considered the sole prerogative of each state.<sup>55</sup> There was more to this restraint, however, than a continued vesting of power in the states to deal with the nettlesome matter of religion.<sup>56</sup> It was also a public proclamation of sorts. The First Congress was laying to rest latent but widespread fears about the new central government by declaring the popular sentiment:

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53. DUMBAULD, *supra* note 51, at 104 ("[E]ven a law prohibiting establishment would be invalid.").

54. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32-42 (1998) [hereinafter AMAR, *BILL OF RIGHTS*]; WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 9, 11 (1964); Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 3 (1996) [hereinafter Amar, *Establishment Clause*]; Mark DeWolfe Howe, *The Constitutional Question*, in *RELIGION AND THE FREE SOCIETY* 49, 51-52, 55-57 (1958); Clifton B. Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 83-85 (1962); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 9 (1978); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1201-02, 1204-07 (1990); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986); William W. Van Alstyne, *What is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 910-11 (1987).

55. This also meant that the federal courts had no subject matter jurisdiction to hear First Amendment claims brought against states said to have violated the religious liberty of their citizens. In one of the first religious liberty cases to come before the Supreme Court, the Court showed that it understood this limitation on its own power. In *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589 (1845), the Court held that neither the First Amendment nor the Constitution *ab initio* protected individuals from state restrictions on the exercise of religious beliefs or practices. The Court first acknowledged that nothing in the Constitution authorized the national government—the Supreme Court in this instance—to protect individual religious rights at the state level: "The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws . . ." *Id.* at 609. Second, the Court recognized that nowhere in the Constitution (for example, it does not appear in Article I, Section 10, which collects several structural limits on the states) was there a structural clause, one parallel to the Establishment Clause restraint on Congress, that denied to states the authority to legislate or otherwise act on the matter of religion: "[N]or is there any inhibition imposed by the Constitution of the United States in this respect on the States." *Id.* The Court dismissed the case as raising issues not within its subject matter jurisdiction. *Id.* at 610.

56. It is important to remember that the constitutions of the states are fundamentally different from that of the United States:

The government of the United States is one of *enumerated powers*; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess.

THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 11 (7th ed. 1903) (footnote omitted).

although there were state-by-state disagreements concerning official support for religion, the national government was one of limited delegated powers and hence had no say in the matter.<sup>57</sup> Accordingly, the resolution of these thorny disagreements was left to each state, which in 1789-1791 were experimenting with a variety of arrangements concerning religion.<sup>58</sup> Those still retaining a form of state church were taking tentative steps in the general direction of disestablishment.<sup>59</sup> Other states were well along in the progression from toleration of nonconformists to a thoroughgoing severance of any institutional dependence between church and state.<sup>60</sup>

The horizontal restraint put in place by the Establishment Clause was that Congress could not enact legislation operable at the *national level*<sup>61</sup> pertaining to "an establishment of religion."<sup>62</sup> In 1789-1791, a minimalist

57. CURRY, *supra* note 49, at 193-94, 215-16.

58. *Id.* at 134-62.

59. *Id.* at 162-92.

60. *Id.* at 209-13, 219-22.

61. At the national level the original text of the Constitution already restrained Congress from requiring any religious test for federal public office. U.S. CONST. art. VI, cl. 3. The states, however, could impose a religious test for holding state and local offices, and most did so in the years 1787-1791. CURRY, *supra* note 49, at 221-22. It was not until *Torcaso v. Watkins*, 367 U.S. 488 (1961), that the Supreme Court struck down state-imposed religious tests as violative of the First Amendment.

62. Also at the national level, the Free Exercise Clause required that Congress refrain from "prohibiting" individual religious exercise. However, in its use of powers delegated elsewhere in the Constitution, Congress might inadvertently burden a religious belief or practice. Examples of such other powers are those to establish and regulate post offices, to regulate commerce with the Indian Tribes, and to make rules for the regulation of members of Congress. If that happened, Congress—being made aware of the burden—could choose to exempt the religious nonconformists from the regulatory burden. But the power to exempt would not derive from the Free Exercise Clause. See DUMBAULD, *supra* note 51, at 105 ("[N]either the First Amendment nor any other part of the Bill of Rights operates as a grant of power, either expressly or by implication; rather it is a restriction upon the exercise of powers already granted elsewhere.").

Assume, by way of illustration, that in 1791 Congress enacted a law regulating conscription into the Army and Navy. Assume also that the Free Exercise Clause did not require a religious exemption. In exercising its power to oversee the armed forces, U.S. CONST. art. I, § 8, cl. 14, nothing prevented Congress from providing exemptions from the draft for religious pacifists. Specifically, such an exemption was not barred by the Establishment Clause. See *Gillette v. United States*, 401 U.S. 437, 450-60 (1971) (holding that limiting the draft exemption to those objecting to all war does not violate Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366, 389 (1918) (upholding the constitutionality of exempting clergy, theology students, and members of pacifist sects from combat service). Because the power to adopt such an exemption is not conferred by the Free Exercise Clause, the First Congress would have had to rely on its powers in Article I, Section 8, Clause 14, to support the exemption.

As a second illustration, assume that the 1791 Congress enacted legislation to hasten the delivery of domestic mail. One provision requires that private-sector contract carriers transit the mail seven days a week. However, employee work schedules are to be adjusted, upon timely request, to enable an employee's attendance at worship services. Again, nothing in the Free Exercise Clause warrants such an exercise of power by Congress. Rather, power to make such a law, including the religious exemption, would have to lie elsewhere, presumably in Article I, Section 8, Clause 7 of the U.S. Constitution.

understanding of "an establishment" was a church ordained by law, much like the Church of England familiar to members of the First Congress.<sup>63</sup> Thus, the most straightforward application of the national-level restraint was that Congress had no authority to set up a national church, or even to support financially the full spectrum of American religions on a nonpreferential basis.<sup>64</sup>

Religious pluralism, albeit a Protestant pluralism, was widespread in America even in 1791, so there was no more prospect then than now of Congress actually establishing a national church. However, absent the Establishment Clause, the possibility of Congress adopting laws within its purview that overly involved the national government with religion could not be ruled out entirely. So adoption of the horizontal restraint was not an empty gesture, but a hedge against possible future abuses.

The meaning of laws "respecting an establishment" surely included a ban at the national level on the sort of legal supports that were closely attendant to a national church. In the popular understanding of the day, an established church was associated with tax assessments explicitly earmarked for the support of religion, a parliamentary role in the appointment of bishops, magisterial enforcement of church discipline, licensure of non-conformist preachers or their meeting houses, and the imposition of test oaths and creeds for civil office holders.<sup>65</sup> These and similar resentments were first directed at the Church of England and later at colonial establishments in New England and the southern colonies.<sup>66</sup>

These resentments were likely thought within the scope of the Estab-

63. CURRY, *supra* note 49, at 192, 197-98, 210.

64. Some argue that the Establishment Clause, while prohibiting the establishment of a single national church, nevertheless authorized Congress to support all religious denominations on a nonpreferential basis. See Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting); CORD, *supra* note 52, at 15; MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14-17 (1978); Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245 (1991). It is unlikely that this was the Framers' intent. In composing the First Amendment, the Framers were almost exclusively negative in their intent, detailing what the new central government could not do rather than what it could do. See *supra* note 49. Non-preferentialists also argue from the text of the Clause, noting that what is prohibited is legislation concerning "an" establishment, leaving open the possibility of multiple establishments. See DUMBAULD, *supra* note 51, at 105-06 (noting the argument but finding it unconvincing).

There is a second argument based on originalism. It does not proceed from a claim that the Establishment Clause affirmatively authorized Congress to aid all religions equally. Rather, the argument is that in situations where the Constitution elsewhere grants Congress the power to aid religion on a nonpreferential basis, nothing in the Establishment Clause prohibits it. This second argument for a limited nonpreferentialism is more difficult to refute.

The Supreme Court first rejected nonpreferentialism in *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948). See also *Lee v. Weisman*, 505 U.S. 577, 612-18 (1992) (Souter, J., concurring); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1988).

65. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 247-71 (enlarged ed. 1992); CURRY, *supra* note 49, at 197-221.

66. CURRY, *supra* note 49, at 197-221.

lishment Clause's national-level restraint, or so it would originally appear. However, the new national government was small and preoccupied with trade, westward expansion, and complicated foreign relations (even foreign invasions), and thus the scope of this horizontal restraint faced few tests in the new Republic. The actions of the first generation of federal officials bound by the Clause demonstrate that certainly all did not believe themselves disabled when it came to "mak[ing] . . . law [operable at the national level] respecting . . . religion." Both Congress and Presidents took actions which, at least by present standards, appear establishmentarian. Well-known examples are land grants in the territories for religious purposes, the funding of congressional chaplains, Thanksgiving Day prayers and proclamations, and Indian treaties that paid for education at church-operated mission schools.<sup>67</sup> These actions throw into confusion the original scope of the national-level restraint in the Establishment Clause.<sup>68</sup>

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67. See ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 21-31 (1990) (noting presidential proclamations for Thanksgiving and national fast days); CHESTER J. ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGIOUS CLAUSES* 159-88 (1964) (noting congressional chaplains, land grant for Baptist church, and Indian treaties that provided money for churches and priests); GERALD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 97-104 (1987) (noting congressional chaplaincies, Thanksgiving proclamations, reenactment of the Northwest Ordinance with its reservation of land for religious purposes, and missions to Indians); CORD, *supra* note 52, at 27-47, 51-80 (noting congressional chaplains, Thanksgiving day proclamations, Indian treaties, and land grants for religious societies); 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 483-517 (1950) (same).

In contrast to the foregoing congressional aid to religion, President James Madison vetoed a bill reserving federal land for a Baptist church, which had, through a surveying error, been built on federal land.

James Madison was a member of the House of Representatives when a chaplaincy was established. And, as President, he issued Thanksgiving Day proclamations. However, late in his life, Madison disapproved of congressional chaplains and Thanksgiving Day proclamations. Letter from James Madison to Edward Livingston (July 10, 1822), in *IX THE WRITINGS OF JAMES MADISON* 98, 100 (Gaillard Hunt ed., 1910) [hereinafter *WRITINGS OF JAMES MADISON*].

Thomas Jefferson, while President, was asked to declare a national day of fasting and prayer. Jefferson refused, using power-limiting argumentation to the effect that the national government was "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in *XI THE WRITINGS OF THOMAS JEFFERSON* 428-30 (Andrew A. Lipscomb ed., 1905); see also ADAMS & EMMERICH, *supra*, at 23, 25; LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 97-100 (1986) (marshalling evidence that Madison opposed congressional chaplancy, as well as executive proclamations on Thanksgiving and fast days). As to the actions of his predecessors, Washington and Adams, having decreed such days, Jefferson replied that their example was borrowed from state governors without careful examination of the differences in the power of the state and federal governments. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in *XI THE WRITINGS OF THOMAS JEFFERSON* 428-30 (Andrew A. Lipscomb ed., 1905).

68. Stuart D. Poppel framed the question well. First noting that numerous scholars attribute to the Establishment Clause its state-level (federalism) restraint and nothing more, Poppel continued:



In order to reconcile words with deeds, some have suggested that the Framers had in mind a near absolutist restraint on national power by the phrase "respecting an establishment," but that there soon followed a gap between lofty principle and actual practice.<sup>69</sup> Others have noted that these departures were few and thus should not be taken as setting a general rule.<sup>70</sup> Still others suggest that Congress's most problematic deeds were in the territories and federal "enclaves" over which congressional power was untempered by state federalism.<sup>71</sup> Finally, concerning events such as Thanksgiving proclamations or chaplaincy prayer, there may have been a failure to distinguish between sentiments the culture found most agreeable and the promotion of religion, specifically Protestant Christianity.<sup>72</sup> It would have been natural for many to have thought a few such pieties were religiously neutral, those common to Protestantism generally, in a society where Catholics and Jews were marginalized and other religions effectively nonexistent. So it could be argued that any lack of sensitivity to religious diversity in the early Republic should not set a precedent.<sup>73</sup> Others counter that the most straightforward explanation is that to its authors in the First Congress "an establishment" had little scope beyond prohibiting a national church.<sup>74</sup>

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This leaves us with a dilemma: how to fashion standards for the national government that accounts for these early actions by Congress, if in fact these actions can be legitimated. In short, if religion was to be no business of the national government, then what justified the actions of the first few Congresses?

Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 287-88 (1994-95) (footnotes omitted).

69. Historian Thomas J. Curry harmonizes the disparity in the actions of the First Congress with more separatistic notions of church-state relations as the not-uncommon gap between declared principle and actual practice. CURRY, *supra* note 49, at 217-19, 221; *see also* Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 716-18 (1997); Laycock, *supra* note 64, at 913-14.

Garry Wills interjects the interesting thought that disestablishment was so new and experimental in the history of state building that Congress, having just promulgated this novel principle, was understandably slow "to sift the dangers and the blessings of the new arrangement, to learn how best to live with it, to complete the logic of its workings." GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 383 (1990).

70. LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 265 (2d ed. 1967); *see also* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1096-98 (1995) (suggesting an interpretation of these congressional actions as not an exercise of legislative power over the subject of religion; hence, the actions were not necessarily inconsistent with an "interpretation of the Establishment Clause as representing no power to the federal government and reserving the same to the states").

71. AMAR, *BILL OF RIGHTS*, *supra* note 54, at 248-49.

72. *See* CURRY, *supra* note 49, at 219 ("The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant, country, and they automatically expected that government would uphold the commonly agreed on Protestant ethos and morality.").

73. Douglas Laycock, *Original Intent and the Constitution Today*, in *THE FIRST FREEDOM: RELIGION & THE BILL OF RIGHTS* 87, 103-05 (James E. Wood, Jr. ed., 1990).

74. BRADLEY, *supra* note 67, at 3; JAMES M. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 56 (1949); Mark E. Chopko, *Intentional Values and the Public Interest—A*

These competing ways of interpreting official acts during America's early nationhood have led to considerable debate, the results of which are inconclusive. The resolution of that debate, however, does not affect the argument of this Article: namely, from its inception the Establishment Clause—whatever the intended scope of its national-level restraint—had the role of a structural clause rather than a rights-based clause.

Although scholars debate which laws were barred to national action by the Establishment Clause, there is greater agreement concerning the nature of past harms that supporters of the Clause sought to prevent.<sup>75</sup> That is,

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*Plea for Consistency in Church-State Relations*, 39 DEPAUL L. REV. 1143, 1165 (1990); Willaim C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 136-37 (1987).

75. In a helpful simplification of the historic moment when the no-establishment principle was adopted, Professor Witte notes that there were essentially two opposing religious groups (the Congregational Puritans and the Protestant pietists) and two opposing political philosophies (the civic republicans and the Enlightenment rationalists).

Both religious groups believed that a moral and self-disciplined people were vital to the preservation of the young Republic, and that religion was the primary source of these citizen virtues. However, Puritans believed that the government therefore had a vital interest in fostering the work of the church. Contrariwise, the Protestant pietists believed that a genuine and uncorrupted religion required that government not interfere in the work of the church.

The civic republicans—like the Puritans—urged that the government take an active role in religion because stability of the new Nation depended on a high morality nurtured by the church. On the other hand, Enlightenment rationalists focused on the potential of sectarianism to divide the civic polity and sought a government directed by reason. So the rationalists sought an end to political disruption caused by religious disagreement, whereas the Protestant pietists sought to halt the government's interference in religious affairs.

The adoption of a Constitution that made no reference to God and required that there be no religious test for federal office, and the adoption of the Establishment Clause two years later, were unquestionably victories for the allied efforts of Protestant pietists and Enlightenment rationalists. The rationalists and pietists sought the same means, namely disestablishment, to achieve different ends. Both got their way. But it is easy to overstate the effect of this accomplishment. Because the Puritans and civic republicans were not driven from the field of engagement, all four of these forces continued to exert considerable influence during the early Republic.

At a minimum the victories of the pietists/rationalist alliance, initially accomplished at the level of the laws of the states, were indelible markers laid down along a path of gradual evolution from established church to the institutional separation of church and state. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 377-88 (1991). No figure better stands as the great synthesizer of the two views of pietism and rationalism than James Madison, borrowing as he did from both schools of thought. See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 61-91 (1998) (profiling the life and thought of Madison on religious freedom and church-state relations); see also DONALD L. DRAKEMAN, *CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE* 55-58 (1991) (stating that Enlightenment thinkers, allied with Baptists and Quakers, sought the same political result but for different reasons); Berg, *supra* note 69, at 709-13, 730-34 (urging the adoption of "voluntarism," the theory that arose out of Protestant pietists' views formulated in resistance to establishmentarianism); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 374 (1992) ("It is important to remember that the votes for disestablishment came from evangelicals. The votes came from Baptists, Presbyterians, Methodists,

there is more agreement when the focus is not on the offenses peculiar to the period of 1789-1791, but on the broader concern over the harms that had made the interaction of political society and religion difficult as Western civilization emerged from the Middle Ages.<sup>76</sup> Those harms were twofold: the political tyranny and civil-sectarian divisions that accompany the establishment of a single church, and the loss of integrity in religion (and its ecclesiastical organizations) when it becomes dependent on governmental support.<sup>77</sup> These are the previously mentioned twin harms to the *civitas* and *religare/ekklesia*,<sup>78</sup> to which this Article returns later.<sup>79</sup>

In the early Republic, the word "establishment" gradually assumed a broader popular definition (as opposed to its definition for First Amendment purposes) than that of a church formally ordained by law. This evolution in meaning was entirely at the state and local level, where nearly all the debate and change were taking place. Indeed, in the year the First Amendment was ratified, the struggle for disestablishment in the states was already in midstride. That grassroots struggle spanned a hundred years from the First Great Awakening to the final disestablishment by Massachusetts in 1833.<sup>80</sup>

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and Quakers.").

76. Much the same idea was articulated by Justice Brennan in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 237 (1963), as he explained his counsel against "too literal a quest for the advice of the Founding Fathers" as follows:

A more fruitful inquiry . . . is whether the practices here challenged . . . tend to promote the type of interdependence between religion and state which the First Amendment was designed to prevent. Our task is to translate the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century . . .

*Id.* at 236 (internal quotation and footnote omitted).

77. 1 WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* 613-84 (1971); WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 153-90 (1986); MARK A. NOLL, *ONE NATION UNDER GOD? CHRISTIAN FAITH AND POLITICAL ACTION IN AMERICA* 65-67 (1988); Laycock, *supra* note 45, at 1049-66; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1436-43 (1990).

Mark DeWolfe Howe's slim volume, *THE GARDEN AND THE WILDERNESS* 5-19, 25-31 (1965), is responsible for bringing to the attention of modern scholars the essential role of Protestant pietists in securing the Establishment Clause in the First Amendment. Professor Howe properly criticized the Supreme Court of the 1950s and early 1960s for attributing this achievement to the Enlightenment rationalists alone. *Id.* at 135-57, 167-76.

78. See *supra* notes 45-48 and accompanying text.

79. See *infra* notes 252-60, 400-13 and accompanying text.

80. ADAMS & EMMERICH, *supra* note 67, at 7-20; HOWE, *supra* note 77, at 8-9; see also WILLIAM H. MARNELL, *THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA* 93-104, 116-44 (1964) (noting the slow and often painful process of disestablishment, especially in New England); 1 MCLOUGHLIN, *supra* note 77, at xvi ("[T]his pietistic version of separation was essentially a pragmatic not an absolutist one; that it evolved slowly and almost opportunistically over the two centuries from 1630 to 1830, gradually expanding its position both legally and theoretically as historical circumstances permitted or required."); PFEFFER, *supra* note 70, at 141 (dating the completion of the "evolution of the American principle" to

During the nineteenth century, the progressive opinion in state governments regarded religion as an institution that should be supported voluntarily and thus not subject to the heavy hand of governmental involvement.<sup>81</sup> Religion was deregulated from ecclesiastical control as well, and—no longer controlled by elites—became classless and thereafter spread mightily among common people.<sup>82</sup> Although religion had been disestablished, state leaders were not taking a stand against religion. Indeed, the free exercise of religion warranted, in their view, specific state constitutional protection. Not inconsistent with these progressive sentiments to limit any official role for religion in government was the widely held belief that a democracy could endure only if composed of an educated and moral citizenry, and that religion was the primary source of the needed moral teaching.<sup>83</sup> By midcentury, the meaning of “establishment” at the state-law level, especially state constitutional law, had evolved into notions of individual freedom and equality among sects.<sup>84</sup> Formal institutional ties between religion and the state governments had been severed and many mutual dependencies were dissolved. Yet state and local governments remained highly subject to the influence of religion—albeit indirectly so and from the ground up.<sup>85</sup>

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the Massachusetts amendment adopted in 1833); 1 STOKES, *supra* note 67, at 358-444 (setting forth an account of the ongoing struggle for disestablishment in the states).

81. CURRY, *supra* note 49, at 222; DRAKEMAN, *supra* note 75, at 83-89; Witte, *supra* note 75, at 378-88. Writing in 1832, James Madison surveyed and commented favorably concerning this progress from established church to voluntarism in the middle states, New England, and the Southern states. Letter from James Madison to Rev. Adams, in IX WRITINGS OF JAMES MADISON, *supra* note 67, at 484, 486.

82. NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 4-16, 21-27, 35 (1989).

83. ADAMS & EMMERICH, *supra* note 67, at 72; ANTHEAU ET AL., *supra* note 67, at 187-88; CURRY, *supra* note 49, at 203, 219; MILLER, *supra* note 77, at 244-46; NOLL, *supra* note 77, at 64-69; STOKES, *supra* note 67, at 555-56.

84. AMAR, BILL OF RIGHTS, *supra* note 54, at 246-54 (acknowledging that the Establishment Clause initially was a structural restraint embodying federalism, and arguing that the nineteenth century perception of “respecting an establishment” at the territorial and state-law level had evolved away from federalism and vaguely toward individual freedom and equality).

85. Alexis de Tocqueville captured the sense of the matter when he observed in the America of the 1830s:

Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions . . . . I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society.

. . . .  
The Americans combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other . . . .

. . . .  
On my arrival in the United States the religious aspect of the country was

Until the first third of the twentieth century, the state-level restraint and the national-level restraint were still securely tucked away in the interstices of the Establishment Clause. However, the slow but steady acceptance of greater institutional separation of religion and government at the state level was uncritically projected onto the federal Establishment Clause and assumed to be the meaning of "an establishment" at the national level as well.<sup>86</sup> Thus, the understanding of "establishment" in the First Amendment was expanded following the pattern that had already occurred in many states. The practical effect of this development was quite limited, however, because the national-level restraint in the Clause was rarely brought into contention during the first half of this century.<sup>87</sup> The record of a mere handful of pre-*Everson* lawsuits in which the Establishment Clause was in-

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the first thing that struck my attention; and the longer I stayed there, the more I perceived the great political consequences resulting from this new state of things. In France I had almost always seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country. My desire to discover the causes of this phenomenon increased from day to day. In order to satisfy it I questioned the members of all the different sects . . . I found that [American Catholic clergy] all attributed the peaceful dominion of religion in their country mainly to the separation of church and state. I do not hesitate to affirm that during my stay in America I did not meet a single individual, of the clergy or the laity, who was not of the same opinion on this point.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 305-08 (Francis Bowen & Phillips Bradley eds., Knopf 1945) (1851).

86. For operative examples of this "projecting onto," consider the arguments in two turn-of-the-century cases: *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (upholding a congressional disbursement of Indian tribal funds held in trust by the federal government for the operation on a reservation, and *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding the use of federal funds for the construction of new buildings at a religious hospital located in the District of Columbia). In both cases the complainants argued that the Establishment Clause was violated by congressional funding of programs operated by religious organizations. In reply, the United States attorney made no attempt to defend the federal government's actions by arguing that the meaning of "establishment" was limited to a national church and its auxiliary props such as religious taxes and test oaths. See *supra* notes 65-74 and accompanying text. Rather, litigants on both sides, and the Supreme Court as well, simply presumed the broader definition of "establishment." These two cases were won by the federal government on the far narrower basis that the Establishment Clause did not extend to the particular forms of financial support then before the Court.

87. National-level conflicts involving the Establishment Clause have been so few that it was not until the mid-1980s when the Court first struck down an act of Congress as violative of the Establishment Clause. See *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding unconstitutional the delivery of special education services on the campus of independent religious schools). This is the only instance of congressional legislation falling to the Court's no-establishment analysis, and *Aguilar* was recently overruled in *Agostini v. Felton*, 521 U.S. 203 (1997). It is extraordinary that, as things stand today, the Supreme Court has only once struck down as violative of the Establishment Clause an action of a federal official or an act of Congress, and that one instance has since been overruled. Thus, Congress has a perfect win-loss record vis-à-vis the Establishment Clause.

voked against the national government bears this out.<sup>88</sup> At the time of *Everson* the New Deal, with its growth in federal domestic programs, was still being adjusted to. Most legislation that really touched people where they lived was that of states and municipalities. Thus, citizens practiced their religion and were affected, if at all, by local school boards, local city councils, and local judges. For citizens who took religion seriously, these local officials were also their like-minded neighbors and often fellow parishioners.

This is where matters stood approaching the middle of this century. It was 1947 when the Supreme Court handed down *Everson*, a decision that continues to roil relations between government and religion to this day.

### III. THE INCORPORATION DEBATE

The state-level (or vertical) restraint dropped out of the Establishment Clause when the Clause was incorporated through the "liberty" provision in the Due Process Clause of the Fourteenth Amendment.<sup>89</sup> The Supreme Court accomplished this, without debate or even seeming appreciation of what it was doing,<sup>90</sup> when it ignored the federalist limitation in the frame-

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88. In *The Selective Draft Law Cases*, 245 U.S. 366 (1918), the Court summarily rejected an argument that religious exemption from the military draft for ministers and theological students, as well as for members of certain pacifistic sects, was an establishment of religion. *Id.* at 389-90. In *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), the Court held that courts must defer to the decrees of ecclesiastical adjudicatories concerning the resolution of religious disputes. Without explicitly referring to the Establishment Clause, the *Watson* Court said that "the rule of action which should govern the civil courts [is] founded in a broad and sound view of the relations of church and state under our system of laws." *Id.* at 727. These two holdings yield limited insight into the Clause's meaning.

Five of the Court's opinions before *Everson* gave only passing reference to the Establishment Clause in obiter dicta. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265-66 (1934) (Cardozo, J., concurring); *Davis v. Beason*, 133 U.S. 333, 345 (1890). But these five cases shed no light on the Clause's meaning.

Hence, prior to the *Everson* decision in 1947, in only two cases had the Supreme Court squarely addressed the meaning of the Establishment Clause. In *Quick Bear*, 210 U.S. at 81-82, the Court sustained a congressional use of Indian tribal funds, held in trust by the government and disbursed to pay for expenses at a Roman Catholic mission school chosen by the parents of the Indian students. In *Bradfield*, 175 U.S. at 295-300, the Court upheld the use of federal funds for constructing a building for a Roman Catholic hospital located in the District of Columbia.

89. The Due Process Clause provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

90. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). Legal historian, Mark DeWolfe Howe, stated the matter this way:

By its re-examination of the purposes of the First Amendment [in *Everson* and *McCullum*] the Court imposed, perhaps quite properly, special limitations on the powers of the national government which . . . gain their strength from concepts of federalism rather than from principles of individual liberty. Yet it then proceeded, without discussion, to make those special, non-libertarian limitations on the national government effective against the

work of the Clause.<sup>91</sup> Despite the criticism that ensued immediately after *Everson* was handed down,<sup>92</sup> sixteen years passed before one of the Court's Justices even sought to mount a serious defense of the incorporation of the Establishment Clause.<sup>93</sup> Ignoring federalism in the Clause was an act of sheer judicial will which is still debated by academicians today.<sup>94</sup>

Unlike the impact on federalism, the restraint in the Establishment Clause operable at the national (or horizontal) level survived the incorpo-

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states as if they were essential to the scheme of ordered liberty prescribed by the due process clause of the Fourteenth Amendment. The Court did not seem to be aware of the fact that some legislative enactments respecting an establishment of religion affect most remotely, if at all, the personal rights of religious liberty.

Howe, *supra* note 54, at 55.

91. In his dissent in *School District of Abington Township v. Schempp*, 374 U.S. 203, 310 (1963), Justice Stewart was resigned to incorporation of the Establishment Clause, but he noted that "it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy."

92. JOSEPH H. BRADY, *CONFUSION TWICE CONFOUNDED: THE FIRST AMENDMENT AND THE SUPREME COURT, AN HISTORICAL STUDY* 51-126 (1955); HOWE, *supra* note 77, at 138-39; Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 14-21 (1949); Howe, *supra* note 54, at 55; Snee, *supra* note 33, at 400-05; see also *supra* note 54.

93. See *Schempp*, 374 U.S. at 253-58 (Brennan, J., concurring). Justice Brennan argued that the religious liberty protected by the Free Exercise Clause (incorporated and made applicable to the states in *Cantwell*, 310 U.S. 296) would not be fully realized if the Establishment Clause prohibited only establishments by Congress. Thus, he concluded, the no-establishment principle must also be incorporated and applied to the states. *Schempp*, 374 U.S. at 257-58 (Brennan, J., concurring). This makes no sense. An individual can most assuredly enjoy a full and equal right to religious liberty in a nation with an established church. Citizens of the United Kingdom, for example, have done so since the late seventeenth century. See also PAUL G. KAUPER, *RELIGION AND THE CONSTITUTION* 56-57 (1964) (arguing that the Fourteenth Amendment may only prevent states from passing religious laws that violate personal or property rights); SIEGAN, *supra* note 33, at 122 (maintaining that Justice Brennan's view that any government support of religion is a violation of individual freedom is incorrect).

94. See, e.g., CORD, *supra* note 52, at 84-101; DREIBACH, *supra* note 52, at 77-82, 89-96; LEVY, *supra* note 67, at 165-85; SIEGAN, *supra* note 33, at 118-23; RODNEY K. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION* 133-70 (1987); Amar, *Establishment Clause*, *supra* note 54, at 1-14; Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1140-42 (1988); Lietzau, *supra* note 54; Paulsen, *supra* note 54, at 321-23; Note, *supra* note 33.

While conceding that the Establishment Clause when adopted was not an individual liberty, Professor Lash has argued that in 1868, when the Fourteenth Amendment was adopted, the congressional understanding of the Clause was reconceptualized as a personal right. Lash, *supra* note 70. Accordingly, concludes Lash, it was proper for the *Everson* Court to incorporate the no-establishment principle as a liberty. Lash's thesis is challenged in Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 14 OHIO N.U. L. REV. 1 (1998). After review of the relevant history in the post-Civil War Congress concerning the text and purpose of the Fourteenth Amendment, as well as debate in that Congress over other religion questions, Brose concludes that no-establishment continued to be viewed as a power-limiting clause rather than as a rights clause. *Id.* at 17-29. Brose takes up each of Professor Lash's points and finds them far less plausible than a straightforward reading of the statements of the Amendment's floor managers and supporters. *Id.* at 20 n.83, 21 n.86.

ration process, indeed, did so without being watered down. The horizontal restraint's survival was not a foregone conclusion. The Due Process Clause incorporates only "libert[ies]" that are deemed by the Court to be fundamental rights. Accordingly, in order to make a power-limiting clause suitable for absorption into the Fourteenth Amendment, the Court had to strain in order to squeeze a structural clause into a "liberty" mold.<sup>95</sup> The critics again objected, this time to the Court's ham-handed treatment of the fundamental-rights principle<sup>96</sup> as if a power-limiting clause was interchangeable with a rights-based clause such as freedom of speech or free exercise of religion.<sup>97</sup>

The national-level restraint did not merely survive incorporation through the Due Process Clause at full strength, its field of operation vastly expanded. The original task of the Establishment Clause—to separate the competencies of the new national government from matters within the

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95. Justice Brennan, concurring in *Schempp*, 374 U.S. at 256, sought to rationalize the dressing up of a structural clause in the garb of a personal right by pointing out that the no-establishment restraint also protects individual liberty. It is true, of course, that structure can protect personal rights. But structure achieves this result only as a by-product of pursuing its task of limiting power. Structure and rights function quite differently. See *infra* text accompanying notes 442-46. Accordingly, it does not follow that a power-limiting clause can be treated the same as a rights-conferring clause.

96. Corwin, *supra* note 92, at 9-10, 19; Daniel L. Dreisbach, *Everson and the Command of History: The Supreme Court, Lessons in History, and the Church-State Debate in America*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS* 23, 32 (Jo Renée Formicola & Hubert Morken eds., 1997) ("The *Everson* Court, critics complained, turned this principle [of federalism] on its head by incorporation (or nationalizing) the nonestablishment provision into the word 'liberty' in the Fourteenth Amendment due process of law clause . . ."); Howe, *supra* note 54, at 53-57, 61; Kruse, *supra* note 54, at 127-30; Kurland, *supra* note 54, at 9-10; Snee, *supra* note 33, at 406; Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 41 (1962) ("To get the establishment clause 'incorporated' into [the Fourteenth Amendment's] words calls for quite a constructional wrench."). Although the words "rights" and "liberties" are not interchangeable, they are closely related. Liberty expresses the belief that individuals (including groups of individuals) have a right to be protected from certain fundamental restrictions. To call something a "right" means that the government will recognize and enforce one's belief that you have a liberty. Rights and liberties are not to be confused with a structural restraint on congressional power.

97. More conciliatory critics argued for incorporation of no-establishment only insofar as the Clause had the effect of indirectly protecting individual religious rights. See Howe, *supra* note 54, at 55-57, 61; see also *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) (appearing to suggest such an approach). This approach accepts the Court's overlooking the federalism element to the Establishment Clause, but rejects the extension of the structural restraint to the states.

One problem with the conciliatory approach is that it waters down the Establishment Clause. Moreover, in some measure, it reduces the operation of the Establishment Clause to securing rights already protected by the Free Exercise Clause. The Free Exercise Clause was incorporated through the Due Process Clause of the Fourteenth Amendment in *Cantwell*, 310 U.S. 296. It makes little sense to also incorporate the Establishment Clause if it is superfluous to rights already protected by the Free Exercise Clause. The only type of case that this watered-down Establishment Clause could remedy that a Free Exercise Clause could not remedy is coercion directed at atheists and agnostics as in *Torcaso v. Watkins*, 367 U.S. 488 (1961). See *infra* note 425.



competency of religion—had grown. Added to its tasks was that of separating the comparable acts of state and local governments from religion. Accordingly, following *Everson*, what has been called here the “national-level restraint,” most commentators termed “separation of church and state” (or simply “separationism”).<sup>98</sup> Implied in separationism is a model of dual jurisdictions: a structural clause separates two competencies and thereby orders relations between religion (including ecclesiastical organizations) and government (national, state, and local).

At the level of local governmental affairs, especially public schooling and ceremonial theism in civic life, separationism in its more absolutist forms hardly represented a well-grounded American consensus in 1947.<sup>99</sup> Moreover, because separationism was being extended to state and local law in a nondemocratic fashion (that is, by judicial decision), opposition quickly arose. Early criticism of incorporation came from those who saw in *Everson*, and the decision a year later in *McCollum v. Board of Education*, an extreme view of government–religion relations<sup>100</sup>—a separationism tantamount to its own religious creed. An influential spokesman for this criticism, Father

98. The term “separationism” is used here advisedly. It carries considerable baggage, not the least of which is that “separationism” is confused with a militantly secular separationism that would wholly privatize religion and disenfranchise religious values in governmental affairs. Nevertheless, use of “separationism” is so longstanding that it is hard to avoid. So I opt to use the term, but then endeavor to clarify what separationism does not mean along with its proper implications. To begin, the “separation of government and religion” has never meant the separation of religious values from lawmaking and the formation of public policy. The Founders contemplated just the opposite. See *Schempp*, 374 U.S. at 213 (“The fact that the Founding Fathers believed devoutly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.”); *supra* text accompanying note 83.

99. In mid-twentieth century America, prayer and other forms of ceremonial theism were very much a part of the political and social culture. See, e.g., Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967). Moreover, in many American communities public education reflected Protestant values and schools often engaged in prayer and Bible-reading. See 1 STOKES, *supra* note 67, at 551-53 (discussing congressional chaplains, Thanksgiving Day proclamations, and grants for religious societies). See generally ROBERT T. HANDY, *A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES* 185-203 (2d ed. 1984).

100. Those who opposed *Everson* and *McCollum* immediately saw that the task of the Establishment Clause, as defined by the Supreme Court, went to matters other than the protection of individual religious freedom. Their response was to argue that *Everson* and *McCollum* were mistaken because no-establishment was merely instrumental (a means to an end) to individual religious freedom. See Wilber Katz, *The Case of Religious Liberty*, in *RELIGION IN AMERICA* 95, 97 (John Cogley ed., 1958) (“The principle of church-state separation is an instrumental principle.”); John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 32 (1949) [hereinafter Murray, *Prepossessions*] (“[S]eparation of church and state . . . appears as instrumental to freedom, therefore as a relative, not an absolute in its own right.”); Thomas B. Keehn, *Church-State Relations*, SOC. ACTION, Nov. 15, 1948, at 31 (“Separation of church and state, then, is simply a means, a technique, a policy to implement the principle of religious freedom.”); George E. Reed, *Separation of Church and State—Its Real Meaning!*, CATH. ACTION, Mar. 1949, at 10 (“Unless the current doctrinaire formula of separation of Church and State is abandoned as a basis for judicial and legislative action, we may ultimately witness the death of religious liberty and with it separation of Church and State in the true meaning of the term, for it is conditioned upon religious liberty.”).

John Courtney Murray, opposed the doctrinaire separationism explicated by Justices Black, Rutledge, and Frankfurter, each of whom wrote separately in at least one of these two cases. Murray insisted that the Establishment Clause did not codify a Protestant pietistic notion of relations between government and religion.<sup>101</sup>

Murray began by assuming that these three Justices accurately characterized the views of James Madison on government-religion relations,<sup>102</sup> a proposition that others have later cast doubt upon.<sup>103</sup> Murray then proceeded to reject Madison's views as having "poured into the First Amendment" of 1789-1791 a perspective on church and state that Murray called "an irredeemable piece of sectarian dogmatism."<sup>104</sup> The prepossessions to which Murray objected were that religion is a wholly private and individualistic matter, that religion (now privatized) is not necessary for political society to be a "good" society, that there should be neither aid to religion nor any form of official relations between religion and government, and that any contributions, however small, of support to churches is harmful to religion because religion is worthy of respect only when "free" of governmental aid and its attendant restrictions.<sup>105</sup>

These views threatened Murray's perspective, rooted as it was in Roman Catholicism. Murray argued that the Establishment Clause took no doctrinaire position on the proper role of relations between religion and government,<sup>106</sup> and it certainly did not make of the church a mere voluntary association subordinate to the state.<sup>107</sup> He blamed Baptists and other Protestant pietists,<sup>108</sup> along with the latter-day secularists and their natural-

101. Murray, *Prepossessions*, *supra* note 100, at 23. Father Murray later elaborated on this theme in JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 58-85 (1964) [hereinafter MURRAY, TRUTHS].

102. Murray, *Prepossessions*, *supra* note 100, at 27-28.

103. See MILLER, *supra* note 77, at 134-35, 217-21, 290-91. Professor Miller gives an account of Father Murray when both were participants in conferences held under the auspices of The Fund for the Republic. A balanced reading of James Madison, unlike that of the Court in *Everson* and *McCullum*, would not have placed Madison in the camp of the secularists given their anticlericalism and near hostility to traditional religion. *Id.* at 134-35.

104. Murray, *Prepossessions*, *supra* note 100, at 30.

105. *Id.* at 28-29.

106. MURRAY, TRUTHS, *supra* note 101, at 63, 79-84.

107. *Id.* at 60, 62, 76-79.

108. The Baptist cause for religious liberty is sympathetically accounted for by a denominational historian in WILLIAM R. ESTEP, *REVOLUTION WITHIN THE REVOLUTION: THE FIRST AMENDMENT IN HISTORICAL CONTEXT 1612-1789* (1990). Additional accounts of the views of Protestant pietists are found at ELWYN A. SMITH, *RELIGIOUS LIBERTY IN THE UNITED STATES: THE DEVELOPMENT OF CHURCH-STATE THOUGHT SINCE THE REVOLUTIONARY ERA* 15-26 (1972); William G. McLoughlin, *The Balkcom Case (1782) and the Pietistic Theory of Separation of Church and State*, 24 WM. & MARY Q. 267 (1967). Modern statements of the Protestant pietistic view of religious freedom and church-state relations are found in STEWART A. NEWMAN, *A FREE CHURCH PERSPECTIVE: A STUDY IN ECCLESIOLOGY* (1986); Franklin H. Littell, *The Basis of Religious Liberty in Christian Belief*, 6 J. CHURCH & ST. 132 (1964); Niels H. Sørensen, *The Theological Basis of Religious Liberty*, 10 ECUMENICAL REV. 40 (1958).

istic humanism, for trying to hijack the Establishment Clause.<sup>109</sup> Murray maintained that during 1789-1791 the Founders were not responding to theological presuppositions but to the pragmatic necessity of forming a new nation from a religiously diverse people.<sup>110</sup> The First Amendment, he argued, was a common pact in which Americans agreed to work out religious differences peacefully, utilizing the available machinery of dialogue and democratic government. In a memorable turn of phrase, Murray summarized his case: the Establishment Clause does not embody articles of faith but articles of peace.<sup>111</sup> It would be ironic, Murray insisted, if the Establishment Clause became the vehicle for imposing a new "piece of ecclesiology" on Americans, for then "the very article that bars any establishment of religion would somehow establish one."<sup>112</sup>

The Supreme Court later backed away from *Everson's* and *McCollum's* absolutist rhetoric, such as faith being a wholly private matter<sup>113</sup> best sepa-

109. MURRAY, TRUTHS, *supra* note 101, at 59-63; see also Nancy H. Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207, 260 (1978) ("To the extent that the establishment clause continues to be infused with the Protestant ideal of complete separation of public and private spheres of activity the establishment clause will stand as a barrier to true religious freedom for millions of [non-Protestant] Americans.").

110. MURRAY, TRUTHS, *supra* note 101, at 67-69, 72-75.

111. *Id.* at 58, 60, 68-70, 85; see also MILLER, *supra* note 77, at 134-35, 218-21 (discussing Father Murray and offering a gentle rebuke of Murray's argumentation). Murray, whose views rejected those held by the Roman Catholic Church in the 1950s, was influenced by his American experience with religious freedom as shaped by Protestantism. George Weigel, *Religious Freedom: The First Human Rights*, in THE STRUCTURE OF FREEDOM: CORRELATIONS, CAUSES & CAUTIONS 34, 46 (Richard John Neuhaus ed., 1991). The Roman Church since Murray and Vatican II has evolved yet further in the direction of acknowledging the free will of persons capable of deciding for themselves matters of faith. *Id.* at 47-49. "[I]n one sense, we can say that the magisterium of the Roman Catholic Church is catching up with Roger Williams." *Id.* at 52.

112. MURRAY, TRUTHS, *supra* note 101, at 60, 63; see also Neuhaus, *supra* note 44, at 1 (arguing that the no-establishment principle was intended to be subordinate to religious liberty within a single religion clause). Father Neuhaus's view makes no-establishment instrumental to the free exercise of religion. See also Murray, *Prepossessions*, *supra* note 100, at 30, 41.

Implicit in Father Neuhaus's essay is that the Supreme Court has not confined the Establishment Clause to the protection of religious liberty, as he would prefer. He is correct that the Court has often applied the Clause to protect economic and other nonreligious interests. See *infra* notes 423-25, 431-33 and accompanying text (describing such cases). Father Neuhaus concluded from this observation that the Court has erred. This Article argues that the Court is not mistaken in viewing the Establishment Clause as having a task independent of the Free Exercise Clause. See *infra* notes 441-46 and accompanying text. This follows because the Clause is structural, limiting the power of government to cross the boundary into sphere of religion. What does not necessarily follow, of course, is agreement that in its modern cases the Court has always correctly located that boundary between government and religion. See *infra* notes 345-55 and accompanying text (describing how *Jimmy Swaggert Ministries v. California Bd. of Equalization*, 493 U.S. 378 (1990), would be decided differently under a view that the Establishment Clause is structural). That is, I agree with the Court that no-establishment is structural, without agreeing with where the Court has located that boundary in all its decisions.

113. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (striking down school policy that denied a church the use of public facilities for showing

rated from civil society and public affairs, that there can be no official acts that take religion (as distinct from nonreligion, or even irreligion) into special account,<sup>114</sup> and that "not one pence" is to be spent in aid of religion.<sup>115</sup> Later scholars have brought balance to the Court's historical accounts regarding James Madison and Thomas Jefferson.<sup>116</sup> Nevertheless, *Everson's* expansion of the scope of the no-establishment principle to state and local concerns was profound because separationism is not neutral as to either political theory (the nature and role of the state) or ecclesiology (the nature and role of the church). Rather, an Establishment Clause that parses society into dual competencies necessarily embodies a substantive choice. Inherent within this choice is a value-laden judgment that certain areas of the human condition best lie within the purview of religion, that other areas of life properly lie within the power of civil government, and that still others are shared by religion and government or remain with the people.<sup>117</sup>

This Article does not argue for a reversal of the Supreme Court's incorporation decision in *Everson*. For purposes of my argument, reversal is neither required nor is it obviously desirable.<sup>118</sup> The Court, in any event,

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a religious film); *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down state university restrictions on student religious organizations meeting on-campus for prayer and worship); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down state prohibition on clergy holding public office).

114. See, e.g., *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding an exemption for religious organizations from nondiscrimination requirements in employment laws); *Gillette v. United States*, 401 U.S. 437 (1971) (upholding a religious exemption from military draft for those who oppose all war).

115. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding federal funding of faith-based counseling centers addressing teenage sexuality); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding vocational rehabilitation aid to a blind individual attending a religious school of higher education to become a youth pastor); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state income tax deduction for parochial school educational expenses).

116. See ADAMS & EMMERICH, *supra* note 67, at 21-26 (discussing Jefferson and Madison); BRADY, *supra* note 92, at 17-26 (discussing Madison); *id.* at 26-29, 174-84 (discussing Jefferson); Daniel L. Dreisbach, *In Pursuit of Religious Freedom: Thomas Jefferson's Church-State Views Revisited*, in RELIGION, PUBLIC LIFE, AND THE AMERICAN POLITY 74 (Luis E. Lugo ed., 1994) (discussing Jefferson); Charles J. Emmerich, *The Enigma of James Madison on Church and State*, in RELIGION, PUBLIC LIFE, AND THE AMERICAN POLITY, *supra*, at 51 (discussing Madison); Meiklejohn, *supra* note 42, at 68-71 (discussing Jefferson); MILLER, *supra* note 77, at 79-150 (discussing Madison); A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 89-96 (discussing Jefferson and Madison);.

117. The nonneutral character of an Establishment Clause that is structural in character is explored *infra* text accompanying notes 224-29 (discussing unique legal status of churches), *infra* text accompanying notes 261-81 (discussing voluntarism), and *infra* notes 450, 472-77 (discussing the admitted bias toward Western tradition).

118. Reversing the incorporation decision would be highly disruptive to the settled law of half a century. The aphorism that, "You can't go home again," is most apt. A rollback of incorporation may do as much harm as good to all sides of the First Amendment debate. It is not just secular liberals but also religious traditionalists who now invoke the Establishment Clause in support of efforts to fend off state intervention into religious matters. Conservative religious interests can be found in the resistance to state intervention into intrachurch disputes, see *infra* notes 169-203, the preventing of regulatory burdens on religious organizations,

has shown no interest in rolling back incorporation.<sup>119</sup> Rather, the aim of this Article is more modest: to undo the doctrinal confusion that results when the no-establishment restraint is mistakenly regarded as a rights-based clause. Notwithstanding its awkward incorporation as a "liberty" through the Due Process Clause, the Establishment Clause still retains its original character as a structural limit on power.<sup>120</sup> When its structural nature is forgotten, confusion soon follows.

America is paradoxical: it is both modern and religious.<sup>121</sup> When the Establishment Clause was made applicable to state and local governments in *Everson*, all the ingredients for controversy were present.<sup>122</sup> History was not to disappoint. From 1947 to the present, America's factions, contending as they do over the role of religion in public life, have sought to enlist the federal courts to play a central part in their skirmishes. The wider culture war soon followed, turning the Establishment Clause into a major killing field for Americans doing battle over the meaning of America.<sup>123</sup>

see *infra* notes 329-55, and in not allowing the delegation of civil power to a religious body, see *infra* notes 238-47.

119. See *Wallace v. Jaffree*, 472 U.S. 38, 44-49 (1985) (rebuffing suggestion that incorporation of the Establishment Clause should be reversed).

120. A possible response is to concede that since *Everson* the Supreme Court has indeed applied the Establishment Clause as structural, as this Article maintains, but that the Court has been wrong to do so. The argument is that the Court took a wrong turn in *Everson* and has been speeding along the wrong path ever since. The right path, in this view, is that the Establishment Clause is instrumental to individual religious liberty and hence is in service of and subordinate to the Free Exercise Clause. See *infra* note 441. That is a plausible position, but the weight of history is against it. See *supra* note 75. Moreover, the position requires expanding the interpretation of the Free Exercise Clause far beyond the task of redressing individual religious injury, see *infra* notes 434-40 and accompanying text, which would cause yet other analytical difficulties.

121. UNSECTULAR AMERICA (Richard J. Neuhaus ed., 1986) (documenting that Americans are as religious in the present as they have been thought to be in the past, probably more so); ALAN WOLFE, ONE NATION, AFTER ALL 39-87 (1998) (religion has not declined in the 1990s and Americans think it has a role in politics, but religious belief is more internal, diverse, and tolerant).

122. It might be asked why controversy followed from incorporation of the Establishment Clause when the understanding of "establishment" at the national level was much influenced by progressive developments that had already expanded its meaning in the states. See *supra* text accompanying notes 80-88. But this misplaces the cause of the ensuing controversy. The consequences that flowed from *Everson's* incorporation that were so profound were that: (1) states had more frequent contact with religion than did the federal government, hence the number of governmental activities subject to First Amendment scrutiny increased many times; and (2) when the Supreme Court decided an Establishment Clause case, the decision was not confined to a single state but affected the entire nation, thereby vastly speeding up the rate of change in less urban regions of the nation.

123. See JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 254-55, 261-71 (1991). See generally OS GUINNESS, THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH 4-20 (1993) (arguing that as religion recedes in its hold on citizens the Republic drifts into a crisis of vitality, for democracy in America is neither self-derived nor self-sustaining but has always drawn strength from traditional religious values).

#### IV. WINDOWS TO THE CLAUSE AS STRUCTURAL: STANDING, REMEDIES, CHURCH AUTONOMY, AND THE NONDELEGATION RULE

The Supreme Court's unusual treatment of certain Establishment Clause cases proves to be a window through which the Court can be seen as applying the no-establishment principle as a structural restraint. To verify the structuralist view, this Part takes up the subjects of standing, class-wide remedies, church autonomy, and the nondelegation rule.

##### A. STANDING TO SUE

That the object of the Establishment Clause is to patrol the boundary between government and religion, and not to protect individual rights as such, is manifested in the Supreme Court's standing cases. The structural character of the Clause is most obvious in the line of cases involving federal taxpayer standing, but it is evident in other cases as well.

Normally a claimant with standing to assert a constitutional right must have suffered a personal, concrete injury that is remediable by judicial process.<sup>124</sup> Because the government's violation of a right will sooner or later result in a concrete injury, the putative constitutional wrong will not be long lived before someone is able to file a justiciable claim. Conversely, the Court denies standing to sue when a claimant has suffered no more than a "generalized grievance,"<sup>125</sup> that is, the plaintiff's requested remedy is simply that the government follow the law, an interest shared by all people within the government's jurisdiction.<sup>126</sup>

In *United States v. Richardson*,<sup>127</sup> for example, the Court denied standing to a plaintiff who claimed that the Account Clause<sup>128</sup> required Congress to disclose the appropriation of all public monies. The plaintiff sought dis-

124. *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (holding that standing requires that plaintiffs allege some personal injury fairly traceable to the defendants' alleged conduct and seek a remedy that is judicially cognizable).

125. *Chemerinsky*, *supra* note 3, § 2.3.5, at 88-97; *cf.* *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777, 1785-86 (1998) (stating that a "generalized grievance" lacks the necessary concreteness not because the alleged injury is widespread, but because of the abstract nature of the asserted interest or injury).

126. *See* *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 485-86 (1982): Although [they] claim that the Constitution has been violated, [plaintiffs] claim nothing else. They fail to identify any personal injury suffered by [plaintiffs] as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms.

*Id.*

127. 418 U.S. 166 (1974).

128. The Account Clause provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

closure of the Central Intelligence Agency budget, which, if brought to light, would have revealed covert operations and other secrets of state.<sup>129</sup> Although the government ostensibly exceeded its power by classifying the CIA budget, no one suffered a personalized injury as a result of the violation. Therefore, the absence of a concrete injury required dismissal of the lawsuit for lack of standing.<sup>130</sup> The Court specifically rejected the plaintiff's twin arguments that he had standing as a United States citizen and as a federal taxpayer.<sup>131</sup>

Foundational to the *Richardson* Court's refusal to reach the merits is that the constitutional clause in dispute, the Account Clause, is structural as opposed to rights-based.<sup>132</sup> In cases like *Richardson*, the Court's distinction between rights and structure is implicit. A violation of a right will result in an individualized injury and thereby produce a claimant with standing to sue. The exceeding of a structural limit, however, will not necessarily result in an individualized injury. Hence, where overstepping a structural restraint is involved, there may not be an individual claimant with standing to sue. *Richardson* is illustrative. The Court, interpreting the scope of its Article III jurisdiction, has consistently reached results where a rights violation is justiciable whereas exceeding a structural restraint, absent a showing of individualized injury, is nonjusticiable.<sup>133</sup>

Of interest here is the Court's general refusal to grant standing in in-

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129. *Richardson*, 418 U.S. at 175 n.8.

130. *Id.* at 180.

131. *Id.* at 176-80; see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (denying standing to plaintiff who claimed that the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2, prohibits members of Congress from holding an office in the executive branch); *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam) (denying standing to plaintiff who claimed that the Incompatibility Clause prohibits a member of Congress from accepting an appointment in the judicial branch "the Emoluments whereof" having been increased during the member's congressional term).

132. See CHEMERINSKY, *supra* note 3, § 2.3.5, at 96-97 (discussing how the structure of some clauses makes them "enforceable only through the political process").

133. The weight of scholarly opinion is that the Supreme Court is mistaken when it refuses to adjudicate claims that other branches of the government have exceeded their constitutional powers. To adjudicate is the Court's duty, it is argued, if it is to retain its rightful place as a coordinate branch of the national government. See ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 97-105 (1987); Donald Doernberg, "We the People": *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 93-95 (1985) (arguing that expansion of standing will eviscerate the Court's power); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) (comparing the individual injury standard with a more general view of injury under Article III); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 472-90 (1996) (discussing the general historical justifications for the individualized injury requirement); Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 375-403 (1993) (stating that a limitless standing doctrine threatens to erode democracy). The Court, however, has given little indication that it will depart from its present course of remedying only "injuries in fact" suffered by individuals. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that an organization's failure to demonstrate a concrete injury prevents the Court from assuming jurisdiction). There is no reason for this Article to take sides in that debate.

stances of structural violations that result in no "injury in fact." If the Establishment Clause is structural, one would expect instances where the Clause is violated but no claimant has the individualized injury required for standing. To adjudicate such a claim the Court would have to radically depart from its rule of requiring personalized injury. That it made a dramatic move to do so in *Flast v. Cohen*<sup>134</sup> bolsters my claim that the Court indeed conceptualizes the Establishment Clause as structural.

The *Flast* Court carved out an exception to the "injury in fact" requirement. Although stated in broader terms, in practice the *Flast* exception applies only when the plaintiffs are federal taxpayers and the claim invokes the Establishment Clause.<sup>135</sup> When government provides a financial benefit to religious organizations, such as parochial schools and church-related colleges, no one suffers coercion, a burden on religious practice, or other personalized injury.<sup>136</sup> *Flast* nevertheless allowed federal taxpayers standing to plead a violation of the Establishment Clause. This is a narrow exception, permitting judicial examination on the merits of participation by religious organizations in federal spending programs. With such claims, the requested remedy is neither a tax refund nor a tax reduction. The lament is not that claimants have suffered an injury because a few cents in general tax revenues were misspent. The putative harm is not that claimants are being coerced against conscience to pay for the religion of others—for that would be attempting to assert a rights-based violation where the Court has consistently ruled there is no such right.<sup>137</sup> Rather, "monetary

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134. 392 U.S. 83 (1968).

135. See also *Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988); *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). In *Valley Forge*, the Court narrowed the *Flast* exception to only Establishment Clause challenges to congressional spending programs. *Id.* at 479-80. *Kendrick* extended the *Flast* test to no-establishment claims brought by federal taxpayers challenging actions of the executive branch. 487 U.S. at 618-20.

136. Public schools may fear a diminution in their funding, but they could never prove a causal link between a slowdown in their funding and passage of a program to aid parochial schools. Certainly parochial schools and their students are unlikely to complain about the government's assistance, which in any event is not being forced upon them.

137. A common assertion by no-aid separationists is that the First Amendment secures a right, as a matter of conscience, to not have tax revenues appropriated for religious purposes. The Court, however, has taken up the claim as to both Religion Clauses and has disagreed. The plaintiffs in *Flast* claimed that payment of a general federal tax, the monies of which were appropriated to religious schools, was religious coercion in violation of the Free Exercise Clause. *Flast*, 392 U.S. at 103, 104 n.25. The Court chose to defer deciding whether that averment stated a claim, and declined to decide whether a federal taxpayer even had standing to raise such a claim. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court returned to the issue and held that a federal taxpayer's claim of religious coercion did not state a cause of action under the Free Exercise Clause. *Id.* at 689. In *Valley Forge*, 454 U.S. 464, claimants challenged as violative of the Establishment Clause the transfer of government property at no charge to a religious college. Several asserted bases for standing were unsuccessful because claimants lacked the requisite "injury in fact." One of the rejected arguments was that claimants had a "spiritual stake" in not having their government give away property for a religious purpose or to act in any other way contrary to no-establishment values. The Court held that a "spiritual stake" in having one's government comply with the Establishment Clause was not a cognizable



damages" in the form of an indeterminant (and surely *de minimis*) amount of taxes are a surrogate for the non-Hohfeldian nature of the injury caused by a misordering of the relationship between government and religion. Accordingly, the claimants' real harm has its basis in the notion that the two "powers" of organized religion and the offices of government must be kept "separate" as required by the Establishment Clause, and, when they are not so separated, taxpayers suffer a non-Hohfeldian injury due to the misordering of these two centers of power.<sup>138</sup>

Even in Establishment Clause cases not brought by federal taxpayers, less rigorous standing rules apply. For example, in state-taxpayer claims the Supreme Court enforces less rigorously the "injury in fact" requirement.<sup>139</sup> A showing that the expenses of the "public fisc" are increased as a

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injury. *Id.* at 486 n.22; see also *United States v. Lee*, 455 U.S. 252, 257 (1982) (requiring Amish employer to pay Social Security tax in violation of his religious beliefs); *United States v. American Friends Serv. Comm.*, 419 U.S. 7 (1974) (per curiam) (holding that Quakers facing federal income tax liability did not have a free exercise right that overrode a provision in anti-injunction act barring claimants from suing to enjoin the government from collecting the tax). As citizens, we are taxed to support all manner of policies and programs with which we disagree. Tax dollars pay for weapons of mass destruction that some believe are evil. Taxes pay for abortions and the execution of capital offenders, which some believe are acts of murder by the state. Taxes pay the salaries of public officials whose policies we despise and oppose at every opportunity. None of these complaints give rise to judicially cognizable "harms" to federal taxpayers. And there is no reason that a taxpayer's claim of "religious coercion" is any different.

138. Although *Flast* permits federal taxpayer standing in Establishment Clause claims, the Court has not permitted citizen standing. Nevertheless, because the claimant is a mere surrogate for the body politic, and the payment of general taxes has nothing to do with either the merits or the remedy, citizenship standing does make more sense than the focus on a *de minimis* tax. See *Flast*, 392 U.S. at 115-16 (Fortas, J., concurring) (stating opinion that citizen standing is acceptable); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 269 (1988) (arguing that there is no need to be concerned with flooding the courts with taxpayer suits). Circuit Judge Arlin Adams characterized the non-Hohfeldian nature of a no-establishment claim brought by a citizen as a "shared individuated right to a government that shall make no law respecting the establishment of religion." *Americans United v. United States Dep't of Health Educ. & Welfare* 619 F.2d 252, 261 (3d Cir. 1980) (allowing citizen standing), *rev'd sub nom.* *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). Judge Adams' characterization is closer to describing what is going on behind the scenes than *Flast's* fiction that the injury is misspent taxes, but he is still off the mark. The real character of the injury is that the structural limit imposed on relations between government and religion has in some manner been transgressed such that the body politic, the integrity of religion, or both are harmed. See *infra* notes 400-13 and accompanying text (laying out the Court's explanation for protecting against these two types of injuries).

139. In claims by state or local taxpayers challenging state or local laws as violative of the Establishment Clause, the leading case is *Doremus v. Board of Educ.*, 342 U.S. 429 (1952); see also *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985) (collecting prior cases in which state taxpayer standing was allowed). In *Doremus*, the Court allowed a state taxpayer to challenge a law only when the law was "[s]upported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting" the government's program. *Doremus*, 342 U.S. at 433. Unlike the rule in *Flast*, under *Doremus* claimants must show more than that they are taxpayers. They must show that the program or offending activity is actually costing tax monies. See also *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 266 n.30 (1963) (Brennan, J., concurring) (discussing the impact of

result of the offending program is all that is required for a claimant to have standing to sue.<sup>140</sup> Reduced-rigor standing rules also apply in claims alleging that religious symbols on government property endorse religion in a manner violative of the Clause.<sup>141</sup> In such cases, the Court only requires a plaintiff who is in the primary zone of exposure to the offending expression.<sup>142</sup> This is not as stringent an injury-in-fact requirement as the Court insists on generally,<sup>143</sup> but it is more rigorous than that required of federal taxpayers in *Flast*.<sup>144</sup>

Although federal taxpayer standing emerged in the late 1960s, the structural character of the Establishment Clause can be seen in earlier cases as well. Without any discussion of standing, the *Everson* Court allowed a taxpayer to pursue a no-establishment claim challenging a New Jersey law that permitted local governments to reimburse parents for bus fare paid to

*Doremus*).

140. *Doremus*, 342 U.S. at 433.

141. Concerning a claim that governmental expression is endorsing religion, Justice O'Connor has essentially identified the nature of the harm as non-Hohfeldian. In describing the no-establishment offense, she uses language like "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders" and making "religion relevant to a person's standing in the political community." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). Yet, this individual is not the claimant at bar but an "objective observer." That is, the injury befalls some abstracted, well-informed fictional plaintiff constructed by the Court as the proxy to represent the interests of the body politic generally. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-82 (1995) (O'Connor, J., concurring) (describing the "objective observer" as a class representative of the body politic). Hence, the Establishment Clause does not give relief for any religious "offense," for that is too subjective. The borderline separating church and state has to be fixed, not dependent upon the sensitivity of the self-appointed plaintiff to multifarious religious practices.

142. See *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201 (1996). In *Robinson*, the circuit court had permitted the claimant standing to challenge as violative of Establishment Clause a city seal that included a Latin cross. The plaintiff often observed the city seal but did not allege its avoidance caused any alteration in his conduct. Three Justices dissented from the denial of certiorari, noting a split in the circuits concerning how much exposure to a religiously offensive symbol was required for standing to raise a no-establishment claim. 517 U.S. at 1202-03 (Rehnquist, C.J., dissenting) (collecting authorities in the circuits, a majority of which permit standing, without more, upon direct exposure to the religious symbol in question); see also *Suhre v. Haywood County*, 131 F.3d 1083, 1086-88 (4th Cir. 1997) (allowing standing to challenge display of the Ten Commandments in courthouse based on claimant's alleged unwelcome direct contact with a display that is apparently endorsed by the government); *Liddle v. Corps of Engineers*, 981 F. Supp. 544, 556-57 (M.D. Tenn. 1997) (collecting authorities in a case where nearby landowners were denied standing to challenge lease between Army Corps of Engineers and religious organization for operation of summer camp as violative of Establishment Clause).

143. See *supra* notes 124-26.

144. The public school prayer cases could also be conceptualized as reduced-rigor standing cases. Students need not be coerced into reciting a prayer or observing a moment of silence in order to have standing. It is sufficient that students are in the primary zone of exposure. The Supreme Court's treatment of public school prayer is discussed at *infra* notes 149-51 and accompanying text.

transport their children to school (including religious schools).<sup>145</sup> The Court reached the merits without even attempting to first identify the nature of the claimant's personal stake in the litigation. This indifference to standing was repeated a year later in *McColum*.<sup>146</sup> The Court there proceeded to rule on a parental challenge to a public school district's practice of allowing teachers from local churches to offer religious instruction thirty minutes a week. Notwithstanding that the courses were elective, and in any event not attended by claimants' children, the majority opinion proceeded to the merits without even addressing the absence of individualized harm.<sup>147</sup>

No sooner had *Everson* and *McColum* been decided than commentators began questioning the standing of the complainants in those cases.<sup>148</sup> A second round of criticism over the Court ignoring normative standing requirements followed the school prayer cases of *Engel v. Vitale*<sup>149</sup> and *School District of Abington Township v. Schempp*<sup>150</sup> in the early 1960s.<sup>151</sup> The students in *Engel* and *Schempp* were exposed to unwanted prayer and devotional Bible reading, but the Court conceded that no students were coerced into

145. *Everson v. Board of Educ.*, 330 U.S. 1, 3-4 (1947).

146. *McColum v. Board of Educ.*, 333 U.S. 203 (1948).

147. *Id.* at 206; see also *id.* at 233-34 (Jackson, J., concurring) (discussing the standing problem in *McColum* without offering any resolution). This pattern of not enforcing regular standing rules was repeated in *Zorach v. Clauson*, 343 U.S. 306 (1952) (reaching the merits in case challenging off-campus release-time program for students to attend religion classes, notwithstanding that classes were optional and not attended by claimants' children).

148. See Corwin, *supra* note 92, at 5-9 (criticizing *McColum* for failing to address standing); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1310-12 (1961) (citing *Everson* as an example of failure to consider standing); Arthur E. Sutherland, Jr., *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1329-44 (1949) (citing *McColum* and *Everson* as examples of the Court "stretching" standing).

149. 370 U.S. 421 (1962) (striking down practice of teacher-led prayer in public schools even though there was no official coercion inducing student participation).

150. 374 U.S. 203 (1963) (striking down program of classroom prayer and Bible reading in public school even though there was no official coercion inducing student participation); see *id.* at 224 n.9 ("[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed."); see also *id.* at 266 n.30 (Brennan, J., concurring) (struggling with the Court's grant of standing to parents of public school students raising an Establishment Clause claim when neither parents nor students suffer economic harm).

151. E.g., Ernest J. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1; Erwin N. Griswold, *Absolute Is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963) (rejecting Supreme Court's view of Establishment Clause as going beyond protection of religious rights); Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1056-64 (1963); Philip E. Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUP. CT. REV. 1, 19-22; Robert G. McCloskey, *Principles, Powers and Values: The Establishment Clause and the Supreme Court*, in RELIGION AND THE PUBLIC ORDER 3 (Donald A. Giannella ed., 1964); Sutherland, *supra* note 96, at 25; see, e.g., Norman Dorsen, *The Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 BUFF. L. REV. 35 (1962) (reporting on a conference discussion about the propriety of standing in no-establishment cases by, inter alia, Professors Norman Dorsen, Leo Pfeffer, Louis L. Jaffe, Kent Greenawalt, Gerald Gunther, and Norman Redlich).

participation or forced by the school to profess a religious belief.

Commentators were correct to point out that the complainants in the prayer cases had no concrete injury and, hence, no standing to claim a loss of personal religious liberty. Where the critics went wrong was in assuming that what was at issue in *Everson*, and eventually remediated in *McCollum*, *Engel*, and *Schempp*, was a personal constitutional right. These cases did not rest on the Free Exercise Clause. Rather, in each the Court impliedly held that the government had exceeded its power by overstepping the structural restraint laid down in the Establishment Clause. However, in order for the Court to reach the merits and adjudicate a claim that a constitutional limitation on power had been exceeded, the normal requirement of "injury in fact" had to be abandoned. The alternative was that no one had standing to sue and, hence, a violation of the Establishment Clause would not (and could not) be corrected by the federal judicial branch.

A further illustration of the confusion that can flow by misconceiving a power-limiting clause as a rights-based clause is found in criticism that the Court allows standing by public-school enthusiasts (as taxpayers) to bring suits challenging governmental aid to religious schools. Particularly vexing to the critics is that the Court allows these public-school boosters to successfully argue that governmental assistance to religious schools should be struck down because the financial aid will undermine the autonomy of the parochial schools. It is illogical, insist parochial school authorities, to allow public-school supporters—who care not about the well being of religious schools—the standing to argue that government aid (and the regulation that follows with the aid) harms religion:

It is simply bizarre to say that hindering church operations with intrusive regulation is an establishment. Yet that is what the Court has said, at least in the context of entanglement arising from financial aid to churches. . . . [B]y making entanglement an establishment-clause doctrine and tying it to financial aid, the Court has created standing for opponents of churches to assert the church's right to be left alone. The churches cannot take this money, say the opponents of financial aid, because if they did the government would have too much say in their affairs. The churches are not complaining, but their opponents are. The Court has never explained why persons not hurt by entanglement have standing to raise entanglement claims. An atheist plaintiff asserting a church's right to be left alone even at the cost of losing government aid is the best possible illustration of why there are rules on standing.<sup>152</sup>

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152. Douglas Laycock, *The Right to Church Autonomy as Part of Free Exercise of Religion*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS* II 28, 38 (Dean M. Kelley ed., 1986) (footnote omitted); see also Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 *GEO. WASH. L. REV.* 645, 662-63 (1992).

But, again, taxpayer standing is a mere surrogate for vesting in a non-Hohfeldian litigant the requisite access to the courthouse in order that the federal courts may adjudicate a structural violation as set out in the Establishment Clause. Because the claim is non-Hohfeldian, there is no one with individualized injury caused by the violation. Rather, the true injury is class-wide and is comprised of either strife along sectarian lines to the injury of the body politic (the *civitas*) or official action that undermines the integrity of religion (the *religar/ekklesia*). In the example of religious-school funding, the undermining-of-religion injury arises *via* entangling or otherwise compromising regulations that divert the school from its central religious mission.<sup>153</sup> Once again, when the Establishment Clause is conceptualized as a structural restraint rather than an individual right, the fog of confusion lifts. Another doctrinal riddle is solved once it is understood why the Court is led to grant standing to a non-Hohfeldian claimant.

### B. NON-HOHFELDIAN REMEDIES

Examining the character of the remedies in successful cases provides additional proof that the Court views the Establishment Clause as structural. When constitutional rights are vindicated against a government entity, awards are normally tailored to redress the individual harm to plaintiffs and nothing more. In Establishment Clause cases, however, the Court often awards class-wide remedies. The orders are typically injunctions that give relief from the sort of non-Hohfeldian or collective harms that occur when the government exceeds its power. For example, government has been found to have no authority to recite or compose prayers,<sup>154</sup> conduct classes in religious training,<sup>155</sup> display a religious code for veneration,<sup>156</sup> or sponsor stand-alone religious symbols.<sup>157</sup> These are subject matters that are inherently religious. Hence, the no-establishment principle negates the

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153. *Lemon v. Kurtzman*, 403 U.S. 602, 620-21 (1971); *id.* at 649 (Brennan, J., concurring); see *Everson v. Board of Educ.*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting) ("The great condition of religious liberty is that it must be maintained free from sustenance . . . by the state. For when it comes to rest upon that secular foundation it vanishes with the resting."). *Aguilar v. Felton*, 473 U.S. 402, 409-10, 414 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985), also relied upon the rationale that no-establishment, *inter alia*, protected religious schools from the secularizing tendencies of state funding. Although *Aguilar* and *Ball* were recently overruled, *Agostini v. Felton*, 521 U.S. 203 (1997), this rationale was not repudiated by the Court. *Id.* at 243 (Souter, J., dissenting).

154. *E.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992) (concerning voluntary school prayer); *Schempp*, 374 U.S. 203 (concerning prayer and biblical devotions); *Engel v. Vitale*, 370 U.S. 421 (concerning prayer).

155. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (concerning voluntary religion classes).

156. *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*) (concerning the posting of the Ten Commandments in public school classrooms).

157. *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (concerning a nativity of Jesus Christ at Christmas).

government's power to act concerning subjects, such as these, that are in the purview of religion.

To illustrate, in *Schempp* and *Engel* the remedy was to enjoin all school prayer rather than to order school authorities to permit the student-plaintiffs to opt out of the prayer.<sup>158</sup> Compare that relief with *West Virginia State Board of Education v. Barnette*,<sup>159</sup> where the children of Jehovah's Witnesses were compelled to salute the United States flag and recite a pledge of allegiance at the beginning of the public school day. The *Barnette* Court held that the compulsory exercise violated freedom of belief, an aspect of that package of rights secured by the Free Speech Clause. The remedy, however, was a mere right to opt out while remaining in the classroom as the other students daily performed the exercise. The constitutional offense was "stopped," in the Court's view, when the Jehovah's Witnesses no longer had to salute and recite. Because the scope of the remedy did not go beyond the person of the claimants, the children were not spared any humiliation as a result of their nonconformity.<sup>160</sup> The difference is that in *Schempp* and *Engel* the constitutional violation did not "stop" until the government stopped the exercise for every student attending the school. Indeed, the injunction even swept into its scope those students who wanted to continue praying.<sup>161</sup>

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158. School authorities insisted the prayer was voluntary. *Engel*, 370 U.S. at 430. There may, of course, have been peer pressure brought to bear on the student-plaintiffs. *Id.* at 431. But the Supreme Court said lack of evidence of coercion was irrelevant. This was not a free exercise claim, where a showing of governmental compulsion is part of the *prima facie* case. Rather, the Court said that in an Establishment Clause claim there was no need to even show that the offending law operated directly on the nonobserving plaintiffs. *Id.* at 430-31.

159. 319 U.S. 624 (1943).

160. See *Brown*, *supra* note 151, at 28 ("The right to dissent does not usually involve the right to be spared the occasions for dissenting.") (footnote omitted).

161. In cases involving a "facial" challenge to the constitutionality of a law, courts can enter an injunction that has the effect of benefiting more than just the actual claimants. For example, claimants may seek an order striking down a municipal ordinance requiring a parade permit because the ordinance "facially" discriminates on the basis of speech content. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). A victory for the actual claimants obviously benefits a class of individuals not before the court, namely conjectural claimants who are having their right to obtain a parade permit "chilled" by the unconstitutional ordinance. The actual claimants have standing to complain about the ordinance "as applied" to them, or they have third-party standing to raise the rights of the conjectural claimants.

That the actual claimants in the parade-permit illustration obtain relief for the conjectural claimants does not negate the argument in the text. There is more going on in Establishment Clause cases than the granting of injunctive relief that has a beneficial effect on the rights of individuals not before the court. That is, in no-establishment cases the government is being ordered to do more than not "chill" the rights of conjectural claimants. In cases like *Schempp* and *Engel*, for example, so far as the record showed only a few students were aggrieved by the prayer. Many students were ambivalent about the prayer, and some students no doubt wanted the prayer to continue. Nevertheless, the Court's remedy enjoined the prayer as to all the students in the school district. The ambivalent students got a remedy from the Court without any evidence that they were aggrieved or considered their rights "chilled," and the students who wanted to continue praying got just the opposite relief from the Court. The only explanation for the broad scope of the remedies in *Schempp* and *Engel* is that the Court was

Soon after the school prayer cases came down, those who would confine the Establishment Clause to redressing personal religious harm, and nothing more, complained of the lack of correlation of the injunctive relief with the student-plaintiffs' actual injuries.<sup>162</sup> These critics would be correct to complain if the Clause did indeed have as its object the securing of an individual right. But the criticism was not well founded if the Clause's object is to restrain governmental power. The real constitutional injury, in the Court's view, was not that the student-plaintiffs in *Schempp* and *Engel* were exposed to unwanted prayer. Rather, the injury was that the government exceeded its power when public school authorities became involved in the inherently religious activity of prayer. The injury of having one's government overly involved with religion is an undifferentiated or generalized grievance, that is, non-Hohfeldian in character. It is an injury shared by virtually everyone who has an interest in their government obeying the law by staying within its constitutional limits. That, in turn, explains why the injunctions in *Schempp* and *Engel* take on their non-Hohfeldian character and run against the government rather than in favor of the individual complainants.

### C. CHURCH AUTONOMY

#### 1. Subject Matter Jurisdiction Dismissals

Many courts, facing cases involving intrachurch disputes, determine that they cannot hear the matter because adjudication will inevitably entail resolving questions of religious doctrine. These courts dispose of the case by dismissing for lack of subject matter jurisdiction or otherwise abstaining.<sup>163</sup> A jurisdictional dismissal is a concession that the issue in dispute, namely one of religious doctrine, is not within the court's constitutional

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ordering the government to keep its activities within the sphere of its delegated powers and consequently out of the sphere reserved to religion. This sort of power-limiting injunction could only come about if the Court viewed the Establishment Clause as structural.

162. See, e.g., *Brown*, *supra* note 151, at 31.

163. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976) (holding that courts have no authority to decide ecclesiastical issues); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 732-33 (1871) (same); *Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997) (stating that decisions of religious association about the appointment and removal of employees in positions of theological significance are not within the subject matter jurisdiction of courts). The Supreme Court does not always use the word "jurisdiction" in its rationale, but its language of dismissal carries the same meaning. See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445-47 (1969) [hereinafter *Hull Church*] ("[It is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions"; hence the First Amendment's "language leaves the civil courts no role in determining ecclesiastical questions in the process of resolving property disputes."); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership.").

power and thus, the court should abstain.<sup>164</sup>

These courts are correct to dismiss for lack of jurisdiction or otherwise abstain, provided that the Establishment Clause is structural. Jurisdiction, of course, concerns the scope of a court's power as defined by the Constitution.<sup>165</sup> These courts could just as well have "reached the merits" and held that the Establishment Clause bars courts from resolving an intrachurch dispute. By "reaching the merits" these courts do not actually hand down a substantive resolution of the spiritual issue dividing the litigants. Rather, the courts conclude that the Establishment Clause denies them the power to adjudicate the dispute.<sup>166</sup>

In announcing these dismissals or abstentions, courts do not attribute their lack of subject matter jurisdiction to Article III of the Constitution. This is proper, for there is nothing in Article III that limits a federal court's power in this regard. Rather, the limitation is imposed by the Establishment Clause.<sup>167</sup> This explains why state courts, although not subject to Article III constraints, still refrain from hearing intrachurch dispute claims.<sup>168</sup>

164. See Kenneth R. O'Brien & Daniel E. O'Brien, *Separation of Church and State in Restatement of Inter-Church-and-State Common Law*, 7 JURIST 259, 265-78 (1947) [hereinafter O'Brien & O'Brien, *Separation*]; Note, *Judicial Intervention In Disputes Over The Use Of Church Property*, 75 HARV. L. REV. 1142, 1184-86 (1962). See generally Kenneth R. O'Brien & Daniel E. O'Brien, *Freedom Of Religion in Restatement of Inter-Church-and-State Common Law*, 6 JURIST 503 (1946) [hereinafter O'Brien & O'Brien, *Freedom*] (arguing that evangelist's right to enter private property to proselytize is within exclusive jurisdiction of the state); Kenneth R. O'Brien & Daniel E. O'Brien, *Restatement Of Inter-Church-and-State Common Law*, 5 JURIST 73 (1945) [hereinafter O'Brien & O'Brien, *Restatement*] (arguing that effect of marriage on ability to take sacraments or re-marry is within exclusive jurisdiction of the church, whereas temporal effects of marriage on rights such as property ownership, succession and heredity, and dower are within exclusive jurisdiction of the state).

165. James Madison once wrote of the Establishment Clause as denying jurisdiction to all three branches of the federal government and then went on to regret two instances where Congress departed from that rule. WRITINGS OF JAMES MADISON, *supra* note 67, at 98, 100 ("[A] favorite principle" with Madison is "the immunity of Religion from civil jurisdiction.").

166. A federal court, of course, always has sufficient jurisdiction to determine its jurisdiction. In order to determine that it lacks subject matter jurisdiction, a court will first have to examine the merits to the extent necessary to determine whether the Establishment Clause prohibits the government—including its civil courts—from assuming the power to resolve a religious dispute. Thus, a determination that the Establishment Clause prohibits adjudication of an intrachurch dispute and a determination that the court lacks subject matter jurisdiction are just different ways of expressing the same conclusion of law.

167. State courts, of course, are not bound by Article III. But since *Everson's* incorporation of the Establishment Clause in 1947, state courts have been restrained by the no-establishment principle.

168. See, e.g., *Music v. United Methodist Church*, 864 S.W.2d 286 (Ky. 1993) (determining that a claim that a church violated the terms of employment contract was outside the subject matter jurisdiction of the court); *Parish of the Advent v. Diocese*, 688 N.E.2d 923, 933-34 (Mass. 1997) (dismissing for lack of a jurisdiction claim disputing authority of bishop and diocesan convention to determine how members could be elected and whether some members of parish remained members after voting to secede); *Schoenhals v. Mains*, 504 N.W.2d 233, 235-36 (Minn. Ct. App. 1993) (holding that Establishment Clause barred review of church members' defamation claim relating to church disciplinary matters); *Howard v. Covenant Apostolic Church*, No. C-960844, 1997 WL 602906 (Ohio Ct. App. Sept. 19, 1997), *app. denied*,



The Supreme Court stated the heart of this matter in *Kedroff v. Saint Nicholas Cathedral*.<sup>169</sup> The First Amendment confers, said the *Kedroff* Court, "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."<sup>170</sup> It is helpful to envision the scope of this jurisdictional bar as a sphere within which the Supreme Court has stated that churches may operate free of civil constraints.<sup>171</sup> A survey of the cases suggests that there are at least four subject areas within which courts will abstain from civil adjudication: (1) questions of doctrine, changes in doctrine, and the resolution of doctrinal disputes;<sup>172</sup> (2) the choice of organizational structure or polity and its administration, including interpretation of a church's organic documents, bylaws, and traditions;<sup>173</sup> (3) the selection, promotion, discipline, and terms of employment concerning clerics and other ecclesiastics;<sup>174</sup> and (4) the admission, guidance, expected moral be-

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688 N.E.2d 1043 (Ohio 1998) (holding claims by parishioner for wrongful termination of church membership, intentional infliction of emotional distress, and defamation dismissed for lack of subject matter jurisdiction); *Tran v. Fiorenza*, 934 S.W.2d 740 (Tex. Ct. App. 1996) (holding that First Amendment barred action for defamation against church diocese); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 789-91 (Wis. 1995) (holding that First Amendment barred action against archdiocese for negligence in hiring, retaining, training, and supervising a priest).

169. 344 U.S. 94 (1952).

170. *Id.* at 116.

171. There are limits to a church's actions even when falling within this well-defined sphere of ecclesiastical autonomy. The Supreme Court has repeatedly said that the line is to be drawn at instances such as fraud or collusion. *See e.g.*, *Jones v. Wolf*, 443 U.S. 595, 609 n.8 (1979); *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 713 (1976). Fraud and collusion are of a type of civil-law claim that involves intentional conduct that is *malum in se*.

172. *See Maryland & Va. Eldership v. Church of God*, 396 U.S. 367, 368 (1970) (*per curiam*) (stating that courts will not resolve religious controversies); *Hull Church*, 393 U.S. 440, 449-51 (1969) (rejecting a rule of law that discourages changes in doctrine); *Watson v. Jones*, 80 U.S. (15 Wall.) 679, 725-33 (1872) (rejecting the implied-trust rule because of its departure-from-doctrine inquiry); *see also Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (holding that courts are not arbiters of scriptural interpretation); *Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914) (holding that religious practices concerning vow of poverty and communal ownership of property are not contrary to individual liberty and will be enforced by the courts).

173. *Milivojevic*, 426 U.S. at 708-24 (holding that civil courts may not probe into church polity); *Hull Church*, 393 U.S. at 451 (holding that civil courts are forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (*per curiam*) (holding the First Amendment prevents the judiciary, as well as the legislature, from interfering in the ecclesiastical governance of the Russian Orthodox Church); *Kedroff*, 344 U.S. at 119 (same); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (*mem.*) (holding that courts will not interfere with the merger of two Presbyterian denominations).

174. *Milivojevic*, 426 U.S. at 708-20 (holding that civil courts may not probe into the defrocking of a cleric); *Kedroff*, 344 U.S. at 116 (holding that courts may not probe into clerical appointments); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of a petitioner who sought an order directing the archbishop to appoint petitioner to ecclesiastical office); *see also NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (refusing to force collective bargaining on a parochial school because of interference

havior, and excommunication of church members.<sup>175</sup>

These case results are most easily attributed to the proper ordering of government-religion relations and hence to the Establishment Clause. This makes sense when the no-establishment principle is conceptualized as structural, operating to define the boundary between the respective competencies of government and religion. In *Watson v. Jones*,<sup>176</sup> the Supreme Court first laid down the broad principles of judicial abstention concerning matters of dispute within religious bodies over polity and doctrine. This post-Civil War case involved a struggle between two factions of a local Presbyterian church for control of the church building. Title to the property was in the name of the trustees of the local church. However, the deed and charter of the local church "subjected both property and trustees alike to the operation of [the general church's] fundamental laws."<sup>177</sup> The general church was the Presbyterian Church of the United States. Its governing body was called the General Assembly. The ecclesiastical rules of the General Assembly stated that the Assembly possessed "the power of deciding in all controversies respecting doctrine and discipline."<sup>178</sup> Following the Civil War, the General Assembly ordered the members of all local congregations who believed in a divine basis for slavery to "repent and forsake these sins."<sup>179</sup> A majority of the local church was willing to comply with the directive. A minority faction, however, deemed the resolution of the Assembly a departure from the doctrine held at the time the local church first joined the general church. The minority's legal theory was that the general church held an interest in the property of the local church subject to an implied trust. A condition of the implied trust was that the church adhere to its original doctrines. Any departure from doctrine by the general church

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with the relationship between church superiors and lay teachers); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 472 (1892) (refusing to apply general law preventing the employment of aliens to a church's appointment of a cleric); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 137 (1872) ("It is not to be overlooked that we are not now called upon to decide who were church officers. The case involves no such question."); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1872) (holding that it is unconstitutional to prevent a priest from assuming his ecclesiastical position because of his refusal to take a civil oath).

175. *Watson*, 80 U.S. (13 Wall.) at 733 (holding there is no court jurisdiction as to church discipline or the conformity of members to the standard of morals required of them); cf. *Steinhauser*, 234 U.S. at 647-51 (holding that so long as an individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated when members are bound to the rules consensually entered into, such as a vow of poverty and the communal ownership of property). As the Court noted in *Bouldin*, 82 U.S. (15 Wall.) at 139-40:

This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership . . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.

*Id.*

176. 80 U.S. (13 Wall.) 679.

177. *Id.* at 683.

178. *Id.* at 682.

179. *Id.* at 691.

meant a breach of trust and a resulting forfeiture of its interest in the property occupied by the local church. Accordingly, the minority faction claimed that the majority relinquished any right to control the property when the general church repudiated the original, proslavery stance. Claiming they were the "true church," the minority faction maintained that they should control the local church real estate.<sup>180</sup>

The implied-trust theory, with its origin in English law<sup>181</sup> and the established Church of England, was rejected by the Supreme Court because its departure-from-doctrine feature required civil adjudication of a religious question. The *Watson* Court gave several rationales for refusing to involve itself in internal church affairs.<sup>182</sup> These reasons are rooted, said the Court, in the American political system that—unlike the English system—separates the institutions of church and state, thereby sharply limiting civil courts' involvement in the affairs of religious bodies.<sup>183</sup>

180. *Id.* at 694-95.

181. *Watson*, 80 U.S. (13 Wall.) at 727-28.

182. The Court offered three rationales. First, civil judges are unschooled in religious doctrine, and thereby not competent to resolve disputes concerning religious doctrine nor to properly interpret church documents and canon law. *Id.* at 729, 732.

Second, for the civil law to award the property to the faction adhering to original doctrine would entail the government "taking sides," thereby "establishing" one confessional position over another while inhibiting future changes in religious doctrine. *Id.* at 730.

Third, both clerics and lay members of a church had voluntarily joined the entire church, the general as well as the local body, thus giving implied consent to the polity of the entire church and its internal administration. *Id.* at 729; see also *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 714-20 (1976) (discussing consent to ecclesiastical decisions). On this third point, the Supreme Court has held that consent to be governed by the church polity and its authorities is sufficient to protect an individual's right to conscience, so long as the individual has the unmitigated right to leave the church at any time. *Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914). Withdrawing from a church, of course, means a cleric or church member leaves behind the "work of one's hands," both spiritual and material. But being willing to leave behind one's spiritual and material works is what was impliedly consented to at the outset when one voluntarily joins both the church-wide units and a local congregation of a denomination. See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1403 (1981).

183. *Watson*, 80 U.S. (13 Wall.) at 727-30. The *Watson* Court clearly premised its holding in terms of lack of jurisdiction or power:

But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious

The elevation of *Watson* to a principle of First Amendment stature began with *Kedroff v. Saint Nicholas Cathedral*.<sup>184</sup> The *Kedroff* Court struck down a New York statute that transferred control of the Russian Orthodox Churches from the central governing hierarchy located in the Soviet Union to a church organization limited to the diocese of North America. The felt need to transfer control of ecclesiastical authority was linked to opposition to Communism and concern over whether the Moscow-based hierarchy was "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body."<sup>185</sup> Because the statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the members" and instead transferred control over domestic churches by legislative fiat,<sup>186</sup> the Court held that the statute violated the "rule of separation between church and state."<sup>187</sup>

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,<sup>188</sup> the rule in *Watson* was unequivocally elevated to a First Amendment principle.<sup>189</sup> *Hull Church* presented a dispute between a general church and two of its local congregations over the right to control the local churches' properties in Georgia. The controversy began when the local churches claimed that the general church had violated the organization's constitution and had departed from accepted doctrine and practice.<sup>190</sup> Georgia followed the implied-trust rule with its requisite fact finding into alleged departures from doctrine. On the basis of a jury finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment for the local congregations. On appeal, the Supreme Court held that the First Amendment does not permit a departure-from-doctrine standard as a substantive rule of decision. The "American concept

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denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws . . . and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

*Id.* at 733-34.

184. 344 U.S. 94, 116 (1952). In *Watson*, the federal trial court had diversity jurisdiction. The rule of decision was based on federal common law rather than the First Amendment because *Watson* was decided prior to *Erie Railway Company v. Tompkins*, 304 U.S. 64 (1938). In following the old rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts sitting in diversity could deviate from state substantive law.

185. *Kedroff*, 344 U.S. at 106.

186. *Id.* at 119.

187. *Id.* at 110.

188. 393 U.S. 440 (1969).

189. The *Watson* Court had repudiated the English implied-trust rule used to sanction the departure-from-doctrine standard, but only as a matter of federal common law. See *supra* note 184. A number of states continued to follow the implied-trust rule as a matter of their own common law. *Kedroff* clearly foreshadowed the sweeping aside of the common law in those states still following the English rule. It took *Hull Church*, however, to complete the task.

190. *Hull Church*, 393 U.S. at 442 n.1.

of the relationship between church and state . . . leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes."<sup>191</sup> If "civil courts undertake to resolve [doctrinal] controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."<sup>192</sup> Thus, the departure-from-doctrine rule worked to "establish" the status quo within the church by penalizing any correction or change in doctrine.

In a dispute more akin to the ecclesiastical differences in *Kedroff*, the Supreme Court in *Serbian Eastern Orthodox Diocese v. Milivojevich*<sup>193</sup> rejected a bishop's resistance to the reorganization of the American-Canadian Diocese of the Serbian Eastern Orthodox Church and his removal from office. *Milivojevich* involved the concerns of internal church administration and clerical appointment, matters insulated from civil review by the First Amendment.<sup>194</sup> The state court decided in favor of the defrocked bishop because, in its view, the church's adjudicatory procedures had been applied in an arbitrary manner.<sup>195</sup> On appeal, the Supreme Court rejected an "arbitrariness" exception to the judicial-deference rule of *Watson* when the question concerned church polity or administration.<sup>196</sup> The "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness'" cannot be borrowed from the civil law as if they were twigs to be grafted onto a church's polity and thereby "modernize" the church.<sup>197</sup> The Supreme Court also reversed the state court's enjoining the diocesan reorganization, holding that the Illinois Supreme Court had impermissibly "delve[d] into the various church constitutional provisions" pertaining to "a matter of internal church government, an issue at the core of ecclesiastical

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191. *Id.* at 445-47.

192. *Id.* at 449.

193. 426 U.S. 696 (1976).

194. *Id.* at 709, 713, 720-21. In *Milivojevich*, there was no dispute between the parties that the Serbian Eastern Orthodox Church was a hierarchical church and that the sole power to remove clerics rested with the ecclesiastical body that had decided the bishop's case. *Id.* at 715. Nor was there any question that the matter at issue was a religious dispute. *Id.* at 709.

195. *Id.* at 708.

196. *Id.* at 712-13. When the issue is within the sphere of church autonomy, there may be no examination by civil courts into whether the highest ecclesiastical adjudicatory body properly followed its own rules of procedure. *Id.* at 713. For a civil court to accept jurisdiction over such subject matters is not "consistent with the constitutional mandate that [the] civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.*

197. *Id.* at 714-15. In reasoning similar to *Watson*, the Court also explained that the basis for a First Amendment prohibition to jurisdiction is that civil courts cannot delve into canon law or church documents. *Id.* These matters are too sensitive to permit any civil probing because inquiry may prove entangling, and thus have the court "taking sides" in a manner "establishing" the prevailing party. Moreover, civil judges have no training in canonical law and theological interpretation. *Id.* at 714 n.8.

affairs.”<sup>198</sup>

The jurisdictional bar to deciding intrachurch disputes is not limited to conflicts over church property. The bar extends to all civil litigation whenever a dispute arises over religious doctrine, including torts,<sup>199</sup> contracts,<sup>200</sup> civil rights nondiscrimination legislation,<sup>201</sup> the extent of religious

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198. *Milivojevic*, 426 U.S. at 721. The Supreme Court has since held that states are permitted, in limited instances, to devise “neutral principles of law” that when properly followed permit the adjudication of intrachurch disputes affecting property. *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979). As the Court said, examining church charters, constitutions, deeds, and trusts to resolve property disputes allowed courts to use “objective, well-established concepts of trust and property law familiar to lawyers and judges.” *Id.* at 603.

The advantage of the neutral-principles approach is that it “obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.” *Id.* at 605. However, the neutral-principles approach may never be used in a manner that transgresses into the sphere of church autonomy. *Id.* at 602 (“It is . . . clear . . . that ‘the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.’”); *see also id.* at 604 (“[T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.”); *Milivojevic*, 426 U.S. at 712-13 (“[T]hat the decisions of the Mother Church were ‘arbitrary’ was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures” and that is an inquiry prohibited by the First Amendment.); *Maryland & Va. Eldership v. Church of God*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring) (“To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine.”); *id.* at 369 n.2 (“Only express conditions [in a church document] that may be effected without consideration of doctrine are civilly enforceable” in a state court.). In other words, an adjudication concerning property is not “neutral” unless it avoids interference with doctrine, polity, the church-clergy relationship, and church membership.

199. *See, e.g., Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993) (dismissing defamation action against church where the offensive statements arose out of church controversy); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (dismissing claim against Roman Catholic Diocese for negligent supervision of priest); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440-41 (Wis. 1997) (holding that the First Amendment prohibited negligent supervision claim); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 810-12 (Md. Ct. Spec. App. 1996) (holding that trial court lacked subject matter jurisdiction over defamation claim against church hierarchy); *Korean Presbyterian Church v. Lee*, 880 P.2d 565 (Wash. Ct. App. 1994) (holding that ecclesiastical abstention doctrine precluded recovery for tort of outrage).

200. *See, e.g., Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997) (affirming lower court dismissal for lack of subject matter jurisdiction over contract and other claims brought by former director of parachurch ministry); *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681, 683-84 (Ill. App. Ct. 1994) (holding that breach of contract complaint was properly dismissed on First Amendment grounds because the matter of whether to employ plaintiff as a parochial school teacher was an ecclesiastical issue into which civil court may not inquire); *Basich v. Board of Pensions*, 540 N.W.2d 82 (Minn. Ct. App. 1995) (holding that First Amendment prevented district court from exercising jurisdiction over action for breach of a pension contract and breach of fiduciary duty); *Pearson v. Church of God*, 458 S.E.2d 68, 71 (S.C. Ct. App. 1995) (holding that trial court did not have constitutional authority to decide

use of real estate to obtain a tax exemption,<sup>202</sup> and criminal fraud.<sup>203</sup>

When abstaining from intrachurch dispute cases, the Supreme Court references the First Amendment generally, not expressly singling out either the Establishment Clause or Free Exercise Clause.<sup>204</sup> This has puzzled academics.<sup>205</sup> Indeed, legal commentators often regard this line of cases as a discrete and archaic backwater of First Amendment law,<sup>206</sup> and one not easily classifiable under either of the Religion Clauses.<sup>207</sup> This is a mis-

claim for breach of contract).

201. See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464-65 (D.C. Cir. 1996) (finding EEOC investigation into Catholic nun's gender discrimination claim was barred by Establishment Clause); *Bollard v. California Province of the Soc'y of Jesus*, No. C 97-3006 SI, 1998 WL 273011, at \*5 (N.D. Cal. May 15, 1998) (dismissing Title VII sexual harassment claim against religious organization because, under Establishment Clause, court lacked subject matter jurisdiction); *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 707-09 (N.D. Cal. 1995) (holding that minister's Title VII retaliation claim should be dismissed based upon excessive government entanglement with religion in violation of Establishment Clause); *Van Osdol v. Vogt*, 908 P.2d 1122, 1130-32 (Colo. 1990) (holding that Establishment Clause insulated a religious institution's choice of minister from judicial review; Title VII claim against church was properly dismissed); *Geraci v. Eckankar*, 526 N.W.2d 391, 399-400 (Minn. Ct. App. 1995) (gender discrimination claim against church is barred by Establishment Clause).

202. See, e.g., *Roman Catholic Archdiocese v. City of East Orange*, 17 N.J. Tax 298, 309, 312-13 (Tax Ct. 1998) (rejecting rigorous examination of either the amount or nature of religious use of property as condition of receiving tax exemption because of desire to avoid conflict with First Amendment); *Institute in Basic Life Principles, Inc. v. Watersmeet Township*, 551 N.W.2d 199, 205 (Mich. App. 1996) (same).

203. *United States v. Ballard*, 322 U.S. 78, 88 (1944) (stating that in trial for mail fraud, the truth or falsity of a religious belief or profession may not be subject to scrutiny by a jury).

204. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), is the possible exception. The "free exercise of religion" is mentioned, but not specifically the Free Exercise Clause. *Id.* at 116. Although other intrachurch dispute cases do not explicitly tie the holding to the Establishment Clause, its equivalent formulation (the "separation between church and state") is mentioned as the rule of decision, including by the *Kedroff* Court. *Id.* at 110.

205. See, e.g., Laycock, *supra* note 182, at 1395 n.176.

206. See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 177 (1986) ("[T]he Supreme Court's deferential attitude to the autonomy of religious organizations" serves as the lone example of "neo-feudalist influence on constitutional thinking."). By "neo-feudalist" influence, Professor Dan-Cohen had reference to the jurisdictional division extant in the Middle Ages aptly described by Dean Roscoe Pound:

In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental. It seemed as natural and inevitable to have church courts and state courts, each with their own field of action and each, perhaps, tending to encroach on the other's domain, but each having their own province in which they were paramount, as it seems to Americans to have two sets of courts, federal courts and state courts, operating side by side in the same territory, each supreme in their own province.

Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 6 (1933).

207. Compare CHEMERINSKY, *supra* note 133, at 1035 n.113 (organizing church autonomy cases under the Free Exercise Clause), with TRIBE, *supra* note 2, § 14-11, at 1231-42 (classifying church autonomy cases as one of five different types of excessive entanglement, a factor in Establishment Clause analysis).

take.<sup>208</sup> The cases are far more a consequence of conceptualizing the Establishment Clause as structural than they are a result of the Court's concern for individual free exercise rights.<sup>209</sup>

## 2. Group Rights

Commentators have, with some sophistication, sought to attribute this church autonomy line of cases to the Court's concern for the rights of religious groups (e.g., churches, synagogues, mosques),<sup>210</sup> hence casting the holdings in terms cognizable under the Free Exercise Clause. The argument is that there are two types of constitutional rights that can be considered "group rights." The first type consists of rights that individuals have vis-à-vis the government because the individuals are members of a particular group. The second type consists of rights that the group *qua* group has vis-à-vis the government and that the group can enforce even to the detriment of dissenting members of the group.

The first type of group right consists of rights the deprivation of which an individual member suffers in common with all other members, and a member can choose to enforce the right regardless of what other members choose to do. Moreover, the group has associational standing to assert these rights on behalf of the members if the group is itself injured in some tangible way.<sup>211</sup> The second type of group right does not give members the same choices. Indeed, the group can use these rights to "oppress" dissident members. That is, the second type may require dissenting members to bow to the wishes of the group because of the belief that the group has interests separate from and superior to those of its members.

Group rights of the first type would be implicated, for example, if a law banning all automobile travel on Sunday morning was enacted with the object of conserving petroleum. An individual requiring travel by car to attend worship services on Sunday morning could sue (alone or as one of several joined in a single lawsuit), averring a burden on religious practice and claiming a violation of the Free Exercise Clause.<sup>212</sup> A church could also

208. It must be conceded that in one small respect the rationale behind these cases is tied to individual free exercise rights. Specifically, the Court implies that when an individual first joins a church, the membership arrangement is somewhat like a contract. See *supra* note 182 (explaining the three rationales for the *Watson* decision). An implied term of that contract is consent to the resolution of any religious disputes that should arise by the highest ecclesiastical adjudicatory. Therefore, the Court reasons, the dissenting member's religious rights are not violated when the internal resolution of a dispute goes against that member. In all other respects, the Court's rationale is structural.

209. Legal historian Mark DeWolfe Howe correctly suggests a historical linkage between the Protestant pietistic view of church-state relations in 1789-1791 and the Court's church autonomy decisions in cases such as *Watson* and *Kedroff*. HOWE, *supra* note 77, at 90.

210. See, e.g., JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 139 (1996); Mark DeWolfe Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 92 n.3 (1953); Laycock, *supra* note 152, at 28; Laycock, *supra* note 182, at 1389, 1392-98.

211. CHEMERINSKY, *supra* note 3, at 80-81.

212. This is not a prediction that the claimant will ultimately succeed on the merits, see



sue, for it would be regarded as sharing with its members an associational right. The church here would be asserting a group right of the first type. The group right is the equivalent of the aggregated rights of the church members.

By way of contrast, intrachurch dispute cases, contend these commentators, vindicate group rights of the second type.<sup>213</sup> The trouble with this construct is that a decision in favor of church autonomy is reached only after pitting one rights claim against another (a majority of members versus a minority of members joined by the institutional church) and then rationalizing (as a matter of policy preference) the elevation of group rights of the second type over the individual religious rights of the majority faction of the membership.<sup>214</sup> By way of illustration, consider a nondenominational Protestant church first organized and incorporated in the 1950s. The church has a long-standing practice of not employing women in the role of pastor. All agree that the practice is doctrinal, having been part of the Confession of Faith set out in the original charter and bylaws. The charter and bylaws also provide that the final authority in all matters of doctrine and practice rests in a five-member Board of Deacons. That board is self-perpetuating. Accordingly, when a vacancy occurs on the board the remaining deacons choose the successor.

Assume the office of pastor becomes vacant in the late 1990s. A woman, otherwise qualified in all respects, applies for the position. A congregational meeting is convened to consider the applicant, at which 65% of the quorum cast ballots to "call" the applicant as the new pastor. The applicant is not hired, however, because the Board of Deacons—adhering to the Confession of Faith—declines to hire a female in the pastorate role. The membership thereafter divides, with a majority still wanting to hire the applicant. A lawsuit is filed against the church, a nonprofit corporation. One claimant is the female applicant. She alleges gender discrimination and cites various civil rights statutes. She is joined by the church members

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*Employment Div. v. Smith*, 494 U.S. 872 (1990) (rejecting a free exercise exemption from generally applicable, neutral legislation), just that the plaintiff has stated a colorable claim on behalf of First Amendment religious liberty.

213. See *infra* text accompanying notes 216-18.

214. The recognition of this second type of group rights is also inconsistent with liberal theory, which elevates the individual as the sole moral unit in society. Liberalism reduces religion to a private and purely individual matter. See, e.g., Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810-11 (1978). Churches and the like are regarded as mere voluntary associations with no more rights than the Rotary Club. See, e.g., Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1126-28 (1996) (urging that federal courts subordinate both free exercise rights and the institutional autonomy of religious organizations to a rule of individual equality). Accordingly, the policy preferences of liberalism cut against recognizing group rights of the second type. This would put the Court's intrachurch dispute cases (assuming the cases affirm group rights of the second type) at odds with liberalism. And to the degree the Court's future direction is influenced by liberal individualism, it diminishes the likelihood that group rights of the second type will continue to be recognized.

from the majority faction. These members, along with the applicant, seek an order to the effect that they should prevail on the hiring issue.<sup>215</sup>

Those making the argument on behalf of group rights of the second type typically have the civil courts weigh the combined gender-equality interests of the applicant and the religious-liberty interests of the majority faction against the religious rights of the church *qua* church.<sup>216</sup> The balance should tip in favor of the rights of the church, they argue, for two reasons.<sup>217</sup> The first reason is utilitarian: religious groups are seedbeds of civic virtue, educating citizens in life's duties and moral responsibilities and expanding society's pluralism while serving as mediating institutions that buffer the individual from a powerful and impersonal state. The second reason is religious: almost all religious experience in the Western tradition has a large communal component. Moreover, these religious communities (churches, synagogues, and the like, which administer these communal religious practices) each perceive of themselves as one body, ontological entities that exist apart from their individual members.<sup>218</sup>

The problems with the utilitarian reason are two-fold: the benefits of associations are not unique to religious organizations, and equally powerful social-utility arguments can be made on behalf of gender equality and the religious liberty interests of the majority faction. Moreover, it conceives of religion as a handmaid in service of the good society, a rationale that ignores why religious people say they are religious, namely, they believe as they do because it is true. As to the religious reason, modern secularists reject the rationale because it is religious. There is a third objection, namely, balancing the conflicting claims of religious factions is itself violative of the Court's First Amendment cases.<sup>219</sup>

The argument of this Article is that there are no First Amendment group rights of the second type. Other than the aggregate religious rights of the members (rights of the first type), there is no Free Exercise Clause right vested in a religious group that supersedes the religious rights of the dissident majority faction. However, if the Establishment Clause is structural, thereby limiting the power of government over the internal operations of religious groups, then the autonomy of the group is nonetheless

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215. The argument by the suing members is that the court should adopt a fairness standard as the rule of law. Arguments from "fairness" usually reduce to the majority rules or to a rule of equality. The latter is decided upon by way of representative democracy, i.e., by the legislature in the form of civil rights legislation. To impose "fairness" standards of this sort will irrevocably alter, if not destroy, the institutional integrity of churches. This does not trouble liberal theory; of course, as such a result is consistent with its policy preferences.

216. GARVEY, *supra* note 210, at 139-40, 149-52.

217. *Id.* at 150-54; see also Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 543-47 (1991) (arguing that churches may be seen as laboratories of civic virtue and mediating institutions).

218. See, e.g., Richard W. Duesenberg, *Jurisdiction of Civil Courts over Religious Issues*, 20 OHIO ST. L.J. 508, 526 (1959); O'Brien & O'Brien, *Freedom*, *supra* note 164, at 510-11; O'Brien & O'Brien, *Separation*, *supra* note 164, at 276-78.

219. See *infra* notes 230-34 and accompanying text.

protected from interference by whatever value preferences that modern society seeks to impose (e.g., majority rule or gender equality).

Conceptualizing the Establishment Clause as structural allows the same result as the proponents of group rights of the second type advocate, but it does so without the problems. No-establishment seen as a power-limiting clause only requires a civil court to determine whether the dispute is within the jurisdiction of government or if the dispute falls into that sphere reserved to the prerogatives of religion.<sup>220</sup> Clearly the employment of ecclesiastics is within the sphere of religion; thus in the illustration a court should summarily dismiss the claim against the corporate church.<sup>221</sup> Moreover, this approach to the problem is descriptive of what courts actually do in intrachurch dispute cases: judicial deference is given to the decisions of the highest ecclesiastical adjudicatory.<sup>222</sup> Courts do not balance conflicting religious rights claims. Rather, they abstain from reaching the merits altogether, citing their lack of competence, or jurisdiction, or using words to that effect.<sup>223</sup> This behavior by the judiciary makes sense only if the Establishment Clause is a limitation on governmental power.

### 3. Juridical Status of Churches

From *Watson* to *Milivojeovich*, it is clear that the Supreme Court does not view the autonomy of religious organizations as proceeding from their members as a result of any jural theory of contract or implied trust. The logic of the Court's opinions inexorably leads to the conclusion that religious organizations have an institutional character distinct from other voluntary organizations and, hence, a unique institutional competency, not the mere sum of the derivative rights of their individual members.<sup>224</sup> Leading scholars agree that this is the Court's logic, variously describing the cases as granting churches "some of the prerogatives of sovereignty,"<sup>225</sup> affording

220. Discussion of the task of locating the boundary between the sphere of civil government and the sphere reserved for religion appears *infra* Part VII.B.

221. See *supra* note 174 (listing cases in which courts abstained from civil adjudication involving selection, discipline, and terms of employment for clerics).

222. If plaintiffs in the illustration will not accede to the decision of the Board of Deacons, and they refuse to vacate the church building in protest, the civil courts are able to bring about compliance by issuing an injunction ordering plaintiffs to leave the premises. See, e.g., *Reorganized Church of Jesus Christ of Latter-Day Saints v. Thomas*, 758 S.W.2d 726, 731 (Mo. Ct. App. 1988) (stating that civil courts must respect, and where appropriate will enforce, the final adjudications of the highest church tribunal).

223. GARVEY, *supra* note 210, at 148.

224. Howe, *supra* note 210, at 92-93.

225. *Id.* at 92-95 (identifying church autonomy as giving religious bodies some of the "prerogatives of sovereignty"); Note, *supra* 164, at 1185 (arguing that *Watson* is "grounded . . . in a notion that religious associations should be accorded certain prerogatives of sovereignty"). Writing shortly after the decision in *Kedroff*, Mark DeWolfe Howe noted that the Court "seems to apply the principle of pluralism to the relationships of Church and State." Howe, *supra* note 210, at 93. By "principle of pluralism," Howe meant "the conviction that government must recognize that it is not the sole possessor of sovereignty," and that the churches are "entitled

ecclesiastical entities a status "distinguishable from other types of voluntary associations,"<sup>226</sup> and as "spiritual bodies . . . requir[ing] distinct constitutional protection."<sup>227</sup> This line of reasoning coincides with the churches' historic claims that they are not jural entities, and not mere creatures of the law deriving their existence from the state. Rather, churches preexisted the state, are transnational, and would continue to exist if the state were suddenly dissolved or destroyed.<sup>228</sup> The authors of the Establishment Clause acknowledged this unique character and thus the necessity of keeping religion and government in the proper relationship. If the law is to order two entities ("separation of church and state"), the law must first recognize the existence of both entities. The juridical consequence is that the status of

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to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority." *Id.* at 91. What Howe described as cosovereigns should not be understood to mean competing civil powers. Rather, government-religion relations means that because there is an area beyond civil affairs, such territory is reserved to the churches. Similarly, when the Court says that government has no competence to determine any one system of belief as religious truth or to be the judge of orthodoxy, *see infra* notes 230-34 and accompanying text, the Court is acknowledging limits to its juridical or civil authority.

226. Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, in *CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT* 67, 95 (Philip B. Kurland ed., 1975) ("[I]n the Court's view voluntary religious associations are constitutionally distinguishable from other types of voluntary associations.").

227. *TRIBE*, *supra* note 2, at 1236 ("[T]he Supreme Court has recognized for nearly a quarter-century that, whatever may be true of other private associations, religious organizations as spiritual bodies have rights which require distinct constitutional protection."); *see also* *HOWE*, *supra* note 77, at 12 ("From time to time the justices [of the Supreme Court] have explicitly acknowledged . . . that their insistence on total separation promotes the best interests of religion . . . [T]hat is, that they have reached the result in question in order that they may, like Roger Williams, protect the garden from the intrusion of the wilderness."); David Little, *The Reformed Tradition and the First Amendment*, in *THE FIRST FREEDOM: RELIGION & THE BILL OF RIGHTS*, *supra* note 73, at 17, 27 ("If the spiritual order was not coterminous with the civil order . . . then the way was clear for a new independent sphere of authority set alongside civil authority."); Herbert Richardson, *Civil Religion in Theological Perspective*, in *AMERICAN CIVIL RELIGION* 161, 178-80 (Russell E. Richey & Donald G. Jones eds., 1974) ("[T]he church cannot acquiesce in the notion that it is a mere congregation or voluntary association established by the authority of its members.").

228. John Courtney Murray states the Establishment Clause principle as follows:

The juridical result of the American limitation of governmental powers is the guarantee to the Church of a stable condition of freedom . . . . It should be added that this guarantee is made not only to the individual . . . but to the Church as an organized society with its own law and jurisdiction. . . . The United States has a government, or better, a structure of governments operating on different levels . . . . Within society, as distinct from the state, there is room for the independent exercise of an authority which is not that of the state. This principle has more than once been affirmed by American courts, most recently by the Supreme Court in the *Kedroff* case.

*MURRAY, TRUTHS*, *supra* note 101, at 78-79; *see also* *Clancy*, *supra* note 34, at 27 ("What we have constitutionally is . . . a logical distinction between two orders of competence. Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's."); *Duesenberg*, *supra* note 218, at 526 n.59; *O'Brien & O'Brien*, *Freedom*, *supra* note 164, at 510-11; *O'Brien & O'Brien*, *Separation*, *supra* note 164, at 276-77; *Stackhouse*, *supra* note 34, at 111.

religious entities is acknowledged by the Establishment Clause, and a sphere is reserved in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission.<sup>229</sup>

This restraint on governmental power also arises in First Amendment cases other than those concerning disputes between factions within a church. For example, the Court has held that a religious belief or practice need not be "central" to a claimant's religion as a prerequisite to receiving the protection of the Free Exercise Clause. Government is prohibited from deciding which practices are at the core of (and therefore more important to) a given religion and which are peripheral to faithful practice.<sup>230</sup> Moreover, a claimant may disagree with coreligionists or be unsure or wavering and still receive full free exercise protection.<sup>231</sup>

The Court states the foregoing rules, not as a personal right, but in terms of a negative on the Court's power: "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."<sup>232</sup> The same concern over restraining governmental power is behind

229. Religious autonomy is served by adherence to the church-state settlement of 1789-1791. This secular liberalism opposes. See *supra* note 214, and *infra* note 465. However, liberalism is well served because the founding constitutional settlement works in two directions. That is, while the integrity of religion is served by cases such as *Kedroff* and *Milivojevic* that protect church autonomy, liberalism's aim to keep religious strife from tearing apart the body politic is served by the bar on the government propagating religion. So long as liberal theory receives its half of the bargain, it must accept the whole bargain. Cf. *infra* note 472.

230. *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-51, 457-58 (1988) (rejecting Free Exercise Clause test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance").

This rule was recently reaffirmed in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2161 (1997), in explaining, inter alia, the decision in *Smith*. The compelling-interest balancing test, abandoned in *Smith*, required a judge to weigh the importance of a religious practice against a state's interest in applying a neutral law without any exceptions. Although this Article need not take a position on whether *Smith* was correctly decided, *supra* note 31, a compelling-interest test can be formulated without violating the rule against weighing the importance of a religious practice. All that need be done is to instruct judges to assess the "compellingness" of the state's claim for uniform enforcement of the law in question without any reference to the claimant's religious practice.

231. *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of religious interpretation.").

232. *Id.* at 716; see also *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (rejecting nonpreferentialism because its application "invite[s] the courts to engage in comparative theology"); *Smith*, 494 U.S. at 887; *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("This Court is ill equipped to sit as a national theology board."); *Lyng*, 485 U.S. at 457-58; *Lee*, 455 U.S. at 257.

the Court's refusal to make detailed inquiries into religious doctrine as well as its resistance to probing the significance of religious words, practices, or events.<sup>233</sup> Importantly, the argument is not that this probing by the courts is in some sense an invasion of ecclesiastical "privacy," that such oversight is "excessively entangling," or that judicial review "chills" associational rights. Rather, the objection is that government has no competence in making decisions that are in the purview of religion. The Court has additionally held that legislative classifications based on denominational or sectarian affiliation are to be avoided. The idea is to not attach to denominational membership a jural consequence, whether advantageous or burdensome.<sup>234</sup>

Each of these Court-made rules of law is far easier to explain when attributed to constitutional structure (i.e., the Establishment Clause) rather than to individual religious rights (i.e., the Free Exercise Clause). Indeed,

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233. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987); *id.* at 344-45 (Brennan, J., concurring) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the core of a religious organization to merit exemption from statutory duties); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (stating that avoiding potentially entangling inquiry into religious practice is desirable); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 272 n.11 (1981) (holding that inquiries into significance of religious words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs.); *Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940) (stating that petty officials are not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* *Espinosa v. Rusk*, 456 U.S. 951 (1982) (mem.) (striking down a charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations); *United States v. Christian Echoes Ministry*, 404 U.S. 561, 564-65 (1972) (per curiam) (holding that the IRS could not appeal directly to the Supreme Court the ruling of a federal district court to the effect that the IRS's redetermination of § 501(c)(3) exempt status was done in a manner violative of the rights of an admittedly religious organization; the IRS had sought to examine all of the religious organization's activities and to characterize them as either "religious" or "political" and, if political, then "non-religious").

234. *Board of Educ. v. Grumet*, 512 U.S. 687, 702-08 (1994); *Gillette v. United States*, 401 U.S. 437, 449-51 (1971); *see also* *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (distinguishing and explaining *Gillette*). The rationale, in part, is that the Court wants to avoid making membership in a denomination of legal advantage or other significance. If the rule stated in the text was not the law, then merely holding religious membership would result in the availability of a civil advantage. For example, it would violate the rule stated in the text if Congress were to confer conscientious objector draft status "on all Quakers," for that may induce conversions (real or *pseudo*) to Quakerism. On the other hand, the government purposefully may utilize classifications based on a person's religious belief or practice—as distinct from denominational affiliation—to lift civil burdens from those individuals. For example, Congress may confer conscience objector draft status on religious pacifists who oppose war in any form. *See Grumet*, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment); *Gillette*, 401 U.S. at 448-60. This is consistent with the rule that government can either treat all alike, not concerning itself with unintended effects, or government can purposefully lift civic burdens from individuals based on their religious practices. What is impermissible is to lift such burdens based on an individual's denominational or religious affiliation.

in some cases it is the religious rights claimant inviting the Court to make the inquiry into religious doctrine, and it is the Court refusing to do so.<sup>235</sup> Thus, the rule could not be vindicating a free exercise right.<sup>236</sup> Some would even expand the concept of jurisdictional dismissals and dual sovereigns as encapsulating the entire law of government-religion relations.<sup>237</sup>

Viewing church autonomy cases as a structural bar to a court's subject matter jurisdiction is yet another way of demonstrating that the Establishment Clause is power limiting. And, of course, it buttresses this Article's thesis for why a clearer understanding of the cases follows when the Establishment Clause is openly acknowledged as structural in character.

#### D. THE RULE OF NONDELEGATION

In cases such as *Kedroff* and *Milivojeovich*, the Establishment Clause kept the prerogatives vested in religion from being undermined by the government's interference with a church's affairs. The rule of nondelegation that emerges from *Larkin v. Grendel's Den, Inc.*<sup>238</sup> is the logical corollary to the foregoing rule. In *Larkin*, the Establishment Clause operated to keep coercive power traditionally vested in government from being transferred to a church.

In *Larkin*, a state enacted a zoning statute that sought to protect houses of worship, schools, and hospitals from the tumult of close proximity to taverns and bars. Under the statute, when a proprietor applying for a liquor license selected a site within 500 feet of a house of worship, the church or synagogue affected was notified and permitted to veto the license's issuance.<sup>239</sup> The Supreme Court overturned the statute as exceeding the no-establishment restraint.<sup>240</sup>

The *Larkin* Court first noted the mutual objectives internal to the Establishment Clause. One objective is to prohibit government from propagating religion or sponsoring its sacerdotal activities. The complimentary objective is to prohibit government from intruding into the precincts of the church.<sup>241</sup> Both objectives require vigilant boundary keeping. The statute in

235. See, e.g., *Bob Jones Univ.*, 461 U.S. at 604 n.30 (stating that a uniform rule denying all tax exemptions to racially discriminatory schools avoids entanglement).

236. A free exercise right could be waived by the claimant. But if the operative principle is a constitutional limit on the Court's power, then the objection to judicial inquiry into religious doctrine cannot be waived. Thus, it can be inferred that the rule of law in these cases is structural in origin.

237. See, e.g., O'Brien & O'Brien, *Separation*, *supra* note 164, at 259. The O'Briens quote James Madison on several occasions writing about church-state relations in terms of government lacking jurisdiction over ecclesiastical matters. They also briefly explicate the common law in England and a few states that regard matters of church-state relations as jurisdictional.

238. 459 U.S. 116 (1982).

239. *Id.* at 117-19.

240. *Id.* at 123.

241. The *Larkin* Court stated:

[T]he objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other . . . .

*Larkin* violated the first objective. The Court held that the sovereign power ordinarily vested exclusively in the agencies of government could not be delegated to a religious organization, as was done by the zoning legislation in assigning to churches a standardless veto power over licenses.<sup>242</sup> The Court stated the prohibited relationship in terms of forbidden “enmesh[ment],”<sup>243</sup> “fusion,”<sup>244</sup> or “union”<sup>245</sup> of religion and government. These characterizations alone are insufficient. A better understanding follows from the Court’s explication of the harm that the nondelegation rule is designed to prevent: “At the time of the Revolution, Americans feared . . . the danger of political oppression through a union of civil and ecclesiastical control.”<sup>246</sup> In *Larkin*, the political oppression took the form of ecclesiastical control over a valuable business license. Matters of commerce are for regulation by the states pursuant to their police power. Ordinary commerce is not in the jurisdiction of the church.<sup>247</sup>

The rule in *Larkin* is that sovereign power ordinarily vested exclusively in government cannot be delegated to a religious organization. When *Larkin* is combined with cases such as *Kedroff* and *Milivojevic*, the Establishment Clause must be seen as a power-limiting clause that arrests abuses running in either direction: government delegating away an exclusive authority to religion, or government intruding into matters that are in religion’s exclusive purview. These two types of abuses result in two different kinds of harm: the political oppression (hence, harm to the body politic or *civitas*) that follows when government assists religion in aggrandizing power; and the undermining of religion and religious groups (*religare/ekklesia*) that follows from government’s overinvolvement in religious

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....  
 . . . The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.

*Id.* at 126 (internal quotations and citations omitted).

242. *Id.* at 127 (“The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”). Moreover, the manner of a church’s exercise of the veto power was wholly discretionary, for there were no standards to which the church was to conform. *Id.* at 125; *see also id.* at 127 (“[The veto] substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards.”).

243. *Larkin*, 459 U.S. at 126, 127.

244. *Id.* at 126.

245. *Id.* at 127 n.10.

246. *Id.*

247. A violation of the nondelegation rule is infrequent because it is uncharacteristic for government (or any entity or individual for that matter) to attempt to give away its power. Hence, at the Supreme Court level only one case besides *Larkin* had nondelegation as a problem. *See Board of Educ. v. Grumet*, 512 U.S. 687, 689-702 (1994) (plurality opinion) (holding a state’s creation of a public school district coterminous with the boundaries of a Jewish sect’s village enclave is “tantamount to an allocation of political power on a religious criterion”). Additional examples of the violation of the nondelegation rule might include government transfers to a church of the power to tax or the power of eminent domain.



affairs. These reciprocal boundary-keeping objectives necessarily entail regarding the Establishment Clause as structural.

Part IV has shown that the Supreme Court views the Establishment Clause as a structural restraint. This is evident from its standing cases and its awarding of class-wide relief in successful Establishment Clause cases, as well as from its jurisdictional dismissals, its way of conceptualizing the juridical status of churches, and its application of the nondelegation rule. These multiple lines of analysis force to the surface the non-Hohfeldian character of Establishment Clause injuries and, hence, the application of the Establishment Clause as a power-limiting clause. Just how the Establishment Clause protects religion from government—a function that many conceive as a task for the Free Exercise Clause—is the topic of the next Part.

#### V. TWIN AIMS: TO AVOID GOVERNMENT INDUCING RELIGIOUS FACTION INTO THE BODY POLITIC AND GOVERNMENT UNDERMINING RELIGION

Since the *Everson* decision in 1947, the Justices of the Supreme Court have proposed all manner of verbal formulae in their attempts to give greater specificity to the scope of the Establishment Clause. Most prominent are the two-prong purpose-effect test first set down by Justice Clark in *School District of Abington Township v. Schempp*,<sup>248</sup> with later accretion of an "entanglement" prong by Chief Justice Burger writing in *Lemon v. Kurtzman*,<sup>249</sup> and the "no endorsement" test first propounded by Justice O'Connor in *Lynch v. Donnelly*.<sup>250</sup> Both the *Lemon* and "no endorsement" tests conceptualize the Establishment Clause as having two tasks, that is, as

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248. The purpose-effect test was twice stated in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963): "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222. Furthermore:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.

*Id.* at 226.

249. 403 U.S. 602 (1971). The Court's *Lemon* test with the added entanglement prong is as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation and citation omitted). Recently the Court appears to have absorbed the entanglement prong back into the effect prong, explaining that entanglement analysis requires an examination of the same evidence as that sifted under the effect prong. *Agostini v. Felton*, 521 U.S. 203, 234-36 (1997). This is a minor but sensible development.

250. 465 U.S. 668, 690-94 (1984) (O'Connor, J., concurring). Justice O'Connor expanded upon and explained her "no endorsement" test in *Wallace v. Jaffree*, 472 U.S. 38, 69-79 (1985) (O'Connor, J., concurring) and sought to defend it against criticism in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 773-83 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

restraining the government from projecting its power in either of two directions.<sup>251</sup>

The first of these tasks is the obvious one of preventing government from singling out religion for special promotion or official sponsorship. The Clause's second task is far more curious to the modern jurist. The Supreme Court's premise is that certain forms of governmental support for religion are ultimately bad for religion. Justice Rutledge, writing in *Everson*, described this dual role of the Establishment Clause, emphasizing that for the sake of religion (at least religion that hopes to maintain its integrity) there should not be too close an embrace by government or a resulting dependence on its treasury:

Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.<sup>252</sup>

Justice Souter, writing in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>253</sup> likewise noted this double restraint in the interstices of the no-establishment principle: "[T]he dual objectives of the Establishment Clause [are] . . . to protect individuals and their republics from the destructive consequences of mixing government and religion [and] . . . to protect religion from a corrupting dependence on support from the Government."<sup>254</sup>

It does not surprise us moderns when the Supreme Court announces that certain governmental attempts to advance religion will result in harm

251. *Lynch*, 465 U.S. at 690 (stating that the Clause was meant to prevent the perception of endorsement or disapproval of religion); *Lemon*, 403 U.S. at 612 (approving an effect that neither advances nor inhibits religion); *Schempp*, 374 U.S. at 222 (stating that the Establishment Clause neither advances nor inhibits religion); *id.* at 226 (stating that it is not within government power to aid or oppose, to advance or retard religion).

252. *Everson v. Board of Educ.*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting) (citation omitted).

253. 515 U.S. 819 (1995).

254. *Id.* at 891 (Souter, J., dissenting). Justice Brennan had earlier acknowledged this double aspect to the Establishment Clause:

It has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams."

. . . .

Our decisions on questions of religious education or exercises in the public schools have consistently reflected this dual aspect of the Establishment Clause.

*Schempp*, 374 U.S. at 259-60 (Brennan, J., concurring) (quoting PAUL A. FREUND, *THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES, AND PERFORMANCE* 84 (1961)).

to the body politic (the *civitas*) in the form of religious factionalism within the republic.<sup>255</sup> The Court's collateral proposition, however, that certain forms of governmental aid can be corrupting or otherwise harmful to religious faith (*religare*) or religious organizations (the *ekklesia*), is—at least to the novice—counterintuitive. This latter proposition is that religion is not only free from governmental interference, but also free from those forms of governmental aid that in practice work to undermine its integrity.

Consider how the Court's premise—that certain attempts by the government to aid religion will end up undermining religion—works in practice. Assume Riverside Church is offered a federal grant to expand its clerical staff and construct an addition to its house of worship, thereby increasing the number of parishioners it can serve. The Parish Council, following protracted and careful consideration, votes unanimously to accept the money. The Council promptly embarks on a new hiring and building program. If challenged as unconstitutional, should a court deny the grant out of a constitutional requirement to *protect* Riverside Church from the untoward consequences that accompany government support of religious ministries? Although advantageous in the short term, perhaps taking the money will over time prove harmful to Riverside Church in terms of loss of autonomy or timidity in its critique of the government's latest policy initiative. On the other hand, should not each religion or local church be able to judge for itself whether taking the grant compromises its message or mission? How does the Establishment Clause divine which public benefit programs will bring injury to a religious community such as Riverside Church that, having carefully deliberated the matter, believes itself more helped than hindered by the proffered grant?

Commentators have puzzled over the Supreme Court's invocation of the Establishment Clause to protect religious organizations from their own decisions to seek governmental aid.<sup>256</sup> This puzzlement is based on a two-fold assumption: the task of safeguarding religion from harmful government actions is that of the Free Exercise Clause, whereas the task of the Establishment Clause is to keep government from supporting the cause of religion.<sup>257</sup> However, when the Establishment Clause is viewed as a structural restraint the juridical task of confining government to the civil sphere also keeps government from being involved with inherently religious matters.<sup>258</sup> This in turn prevents government invasion into the sphere reserved

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255. The government-induced harm to the body politic that the Establishment Clause is designed to prevent is discussed *infra* notes 400-11.

256. *E.g.*, Laycock, *supra* note 182, at 1378-88, 1416; Robert E. Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 VAL. U. L. REV. 285 (1984). *But cf.* Laycock, *supra* note 75, at 380 ("The other set of harms from noncoercive establishments is to the religious majority.").

257. See Laycock, *supra* note 182, at 1384 ("Government support for religion is an element of every establishment claim.").

258. See *infra* notes 329-63 and accompanying text (discussing regulatory burden on, and exemptions for, religious organizations).

for religion, including government-proposed forms of financial aid that may ultimately compromise religion. Moreover, this protection of religion from seemingly benign assistance is one of the Establishment Clause's twin objectives, not just an incidental effect of the Clause's operation.

A structuralist view of the Establishment Clause thus explains how the no-establishment principle comes to protect religion even from a government's well-meaning attempt to support it, solving yet another doctrinal riddle. It makes sense that within the constitutional scheme for the Establishment Clause, one of its two tasks is to protect religion from government.<sup>259</sup> Safeguarding individual religious belief and practice is the object of the Free Exercise Clause, and no one seriously doubts the appropriateness of secular government protecting the free exercise of its citizens. If the Establishment Clause has as one of its two objects the avoidance of involvement with that sphere of activity reserved to religion, that too is a secular objective.<sup>260</sup> At times various religions will, of course, make decisions that result in harm to themselves. That is not the concern of the Establishment Clause. Rather, the aim of the Clause is for *government* to avoid activities that harm the integrity of religion (*religare*) or religious organizations (the *ekklesia*).

The Clause thereby has the ironic twist, on more than just a few occasions, of protecting religion from its own bad choices. In the illustration, the Establishment Clause would prohibit the federal grant to Riverside Church, and the rationale, *inter alia*, is that aid of that nature would be detrimental to religious organizations. But how is it that the no-establishment principle presumes to tell the church what is best for the church?

#### A. VOLUNTARISTIC RELIGION

Precursors to the separate ordering of government and religion, and

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259. The rejection of a vigorous protection for "church autonomy," insofar as the Clause's protection of religion is justified by religious thought, is just prejudice against religious epistemology (and favoritism toward secular liberalism). See, e.g., Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 324 (1996) ("These religious beliefs are consistent with the Constitution, and they are among multiple reasons that motivated a broad coalition to enact constitutional guarantees of religious liberty. But these religious beliefs cannot be imputed to the Constitution without abandoning governmental neutrality on religious questions."). This is the sort of discrimination that these selfsame scholars have rightly condemned in others. The Constitution, however, is an open book; its interpretation allows for drawing upon both secular and religious thought, or whatever else influenced the Framers. In this instance, some of the best justifications for the Establishment Clause include religious thought. See Berg, *supra* note 69, at 732-33 (agreeing with Professor Laycock's theory but allowing for its justification in religious terms); see also Stephen L. Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1640-41 (1997) (arguing that state interests are inferior to free exercise interests because the struggle to know God is the purpose of human existence); Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1598, 1606 (1997) (arguing that protecting free exercise only makes sense if God exists).

260. See *infra* notes 282-92 and accompanying text.

the view that such ordering is best for religion, are found in developments in the sixteenth century. With the Reformation, there began to evolve in the Western world an understanding that authentic religion presupposes adherents coming to their faith free of state coercion.<sup>261</sup> Two and a half centuries later, the Enlightenment, with its celebration of reason and the individual, routed the remaining vestiges of Constantinianism.<sup>262</sup> In America, unlike Great Britain and the European Continent, this resulted in more than mere official toleration of dissenting religions. Developments in political theory on these shores took a unique turn resulting in religious voluntarism: the juridical stance that beliefs and practices that are inherent to religious faith are not to be the intentional object of governmental influence.<sup>263</sup> Government could, of course, continue to legislate about morality, but it was to refrain from matters inherently religious.<sup>264</sup> That uncommon turn of events is today reflected in the strictures laid down by the Establishment Clause. It accounts for why the government is restrained from involvement with prayer, devotional Bible reading, the teaching of religious doctrine, veneration of the Ten Commandments,<sup>265</sup> and similar practices that are inherently religious.<sup>266</sup>

Voluntarism is not merely the absence of official coercion. It is also the absence of the government's influence concerning inherently religious beliefs and practices. Official coercion of religiously informed conscience can (and often will) result in individual religious injury. Such injury or harm is a matter to be addressed by the Free Exercise Clause.<sup>267</sup> But government can

261. Winthrop S. Hudson, *The Theological Basis For Religious Freedom*, 3 J. CHURCH & STATE 130, 134-35 (1961); David Little, *The Reformed Tradition and the First Amendment*, in *THE FIRST FREEDOM: RELIGION & THE BILL OF RIGHTS*, *supra* note 73, at 17, 28, 34-35.

262. See *supra* note 75 (citing authorities summarizing the alliance between pietists and rationalists in the effort to achieve disestablishment).

263. The term "voluntarism" can be confusing because it is not used narrowly in the sense of uncoerced belief or practice. Voluntarism means that government is restrained from active and intentional involvement in inherently religious affairs. Historically the term referred to "the voluntary church," meaning that a church is most genuine when it draws support from responding hearts and minds entirely unassisted (as well as undeterred) by government. See *TRIBE*, *supra* note 2, § 14-3, at 1160 (Voluntarism means "that the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state.").

Because the term "voluntaristic" is confusing, perhaps its use ought to be abandoned. Indeed, that may already be taking place. The principle that government should act, either when imposing burdens or extending benefits, so as to influence as little as possible individual religious choices in the newer literature is being called "substantive neutrality," see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990), or simply "neutrality theory," see Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 4-5, 20-22 (1997).

264. See *infra* notes 468-70 and accompanying text.

265. See *supra* note 20 (describing restrictions on governmental actions).

266. Further discussion concerning the Supreme Court's distinction between laws touching on practices that are "inherently religious" and laws that have a basis in societal mores appears *infra* notes 451-61, 478 and accompanying text.

267. See *supra* note 436 and accompanying text.

act in ways that shape people's religious choices, albeit its acts fall short of coercion. For example, a public school teacher who, at the close of each school day in December, urges her students to "remember to keep Christ in Christmas," does not force anyone to do anything and erects no official barriers to the religious observance (or nonobservance) of her students.<sup>268</sup> Yet, it is these more furtive influences that undermine religious voluntarism and therefore are prohibited.<sup>269</sup> The Supreme Court accomplishes this task through the restraint on government built into the Establishment Clause.<sup>270</sup>

Justice Stevens, writing for the majority in *Wallace v. Jaffree*,<sup>271</sup> acknowledged that voluntarism, as a step beyond preventing coercion of conscience, has been recognized by the Court as part of the government-religion settlement in the First Amendment:

[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . .<sup>272</sup>

From the perspective of constitutional law, then, religions of integrity ("worthy of respect") are those religions subscribed to and held wholly apart from the government's influence. Justice Blackmun has likewise observed that one idea underlying no-establishment is that "religion flourishes in greater purity, without than with the aid of Government."<sup>273</sup> Therefore, so as to abound ("flourish") and avoid corruption ("purity"), by law religions may not depend on certain forms of governmental aid. For religious belief to be genuine it must be the product of ecclesial institutions with integrity and vitality.<sup>274</sup> The Court's position is a religious proposition

268. *McCollum*, 333 U.S. at 233 (Jackson, J., concurring) ("[I]t may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.").

269. *Weisman*, 505 U.S. at 606 (Blackmun, J., concurring) ("Our decisions have gone beyond prohibiting coercion . . . because the Court has recognized that the fullest possible scope of religious liberty . . . entails more than freedom from coercion.") (quotation and citation omitted).

270. In the example of the public school teacher, the Establishment Clause restraint is exceeded as a result of the teacher's remark regardless of whether some or all students are Christians, some or all subscribed to a non-Christian religion, or some or all hold no religion. See *infra* notes 420-21, 425, 440 and accompanying text. The no-establishment restraint being transgressed quite independent of any individual harm is, of course, indicative of its structural character.

271. 472 U.S. 38 (1985) (overturning a state law requiring a moment of silence in public schools for prayer or meditation).

272. *Id.* at 52-53 (footnotes omitted).

273. *Weisman*, 505 U.S. at 608 (Blackmun, J., concurring) (internal quotation and citation omitted).

274. See Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*:

that overlaps with a secular one. This constitutional settlement was born, in part, of the untoward experience that "any religion that had relied upon the support of government to spread its faith"<sup>275</sup> lost the people's respect. Religious persecution has brought eventual ruin to the cause of the dominant faith.<sup>276</sup>

Looking back over half a century of public life, James Madison observed that the improvement of religion following disestablishment in Virginia and elsewhere in the South was proof that the experiment with voluntarism was good for religion:

And if we turn to the Southern States where there was, previous to the Declaration of Independence, a legal provision for the support of Religion; and since that event a surrender of it to a spontaneous support by the people, it may be said that the difference amounts nearly to a contrast in the greater purity & industry of the Pastors and in the greater devotion of their flocks, in the latter period than in the former . . . . [T]he existing character, distinguished as it is by its religious features, and the lapse of time now more than 50 years since the legal support of Religion was withdrawn sufficiently prove that it does not need the support of Govt . . . .<sup>277</sup>

When James Madison wrote that conditions in the states had favored religion, he meant conditions favored voluntaristic religion, that is, religion untainted by the government's purposeful favoritism.<sup>278</sup>

*Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968) ("Institutional independence of churches is thought to guarantee the purity and vigor of their role in society, and the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.") (footnotes omitted).

275. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

276. Theologian and Union Seminary professor, Robert L. Dabney, observed over a century ago:

The history is, that no communion ever persecuted which did not cut its own throat thereby . . . . The persecuting communion dies, either by the hand of the outraged and irresistible reaction it produces; or if the persecution is thorough, by the syncope and atrophy of a spiritual stagnation, that leaves it a religious communion only in name.

ROBERT LEWIS DABNEY, *Religious Liberty and Church and State*, in LECTURES IN SYSTEMATIC THEOLOGY 873, 877 (Zondervan Pub. House ed., 1972) (1878).

277. Letter from James Madison to Rev. Adams (1832), in WRITINGS OF JAMES MADISON, *supra* note 67, at 484, 486.

278. In 1822, James Madison, now an elder statesman, wrote to Edward Livingston: [I]t is impossible to deny that [in Virginia] Religion prevails with more zeal, and a more exemplary priesthood than it ever did when established and patronized by Public authority. We are teaching the world the great truth that Govts. do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Govt.

Letter from James Madison to Edward Livingston (July 10, 1822), in XI WRITING OF JAMES MADISON, *supra* note 67, at 98, 102-03.

Although formal alliances between government and church yielded grudgingly in America, genuine religious faith is now presumed (from the perspective of the First Amendment) to be a matter of personal inquiry and persuasion<sup>279</sup> rather than official privilege or juridical status. Influenced as it was by the common cause of Protestant pietists and devotees of the Enlightenment,<sup>280</sup> the constitutional settlement now lodged in the Establishment Clause leaves religious communities to attract members by force of their doctrine and appeal of their beneficence, not by the imprimatur of officialdom. Most certainly, then, the government should not become an agent for achieving religious propagation. The Establishment Clause, applied by a Supreme Court that presumes voluntarism, now restrains government when its actions involve the civic arm in inherently religious matters. And the Clause does so, in part, to protect religion—that is, voluntaristic religion.<sup>281</sup>

### B. A LIMITED STATE

A natural correlative to the first principle—voluntarism—is that religions that point to a transcendent authority help check the power of the modern nation-state. This is because such religions refuse to recognize the state's sovereignty as absolute. Transcendent religions posit another sovereignty—a God (or gods)—that is (are) beyond, before, and superior to the state. Indeed, theistic religion posits a Sovereignty that sits in judgment over the state, its ambitions to temporal power, and its pretensions of infallibility. It is for this reason that at crucial points in Western history the institutional church had a "pivotal role in guarding against political absolutism."<sup>282</sup>

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279. Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State*, 49 LA. L. REV. 1057, 1059 (1989); Carvey, *supra* note 35, at 285-86.

280. See SMITH, *supra* note 108, at 15-26 (explicating the role of Isaac Backus, a New England pastor, as a type representing the evangelical theory of church-state relations); *supra* note 75. See also *supra* note 254 in which Justice Brennan, concurring in *Schempp*, acknowledged that history shows that both Protestant pietism and Enlightenment rationalism gave rise to the Establishment Clause.

281. Given this very Protestant perspective of government-religion relations, especially the individualistic view that religious faith is genuine only if the product of free will, it is little wonder that some non-Protestants chafed at *Everson's* extension of voluntaristic religion to state and local governments. Consider, for example, the Roman Catholicism of John Courtney Murray, *supra* notes 101-12 and accompanying text, and Richard John Neuhaus, *supra* note 112 and *infra* note 476, as well as the Judaism of Stephen Feldman, *infra* note 476.

282. Bradley, *supra* note 279, at 1072. When individuals in a society believe that human rights are derived from an authority higher than the state, it invites self-criticism of the acts of state. This renders the totalitarian state illegitimate and places religio-moral restraints on the use of political power. See ALDOUS HUXLEY, *Politics and Religion*, in GREY EMINENCE: A STUDY IN RELIGION AND POLITICS 288 (3d ed. 1941):

Totalitarian politicians demand obedience and conformity in every sphere of life, including, of course, the religious . . . [T]he only kind of religion they favour is strictly anthropocentric, exclusive and nationalistic. Theocentric religion, involving the worship of God for his own sake, is inadmissible in a totalitarian state. All the contemporary dictators, Russian, Turkish,



*Religare* ("to bind") and the *ekklesia* (churches) are realities that carry major political implications. Transcendent religion is indeed too powerful to allow politics to control it, and thus the Constitution disestablished it. The complete opposite—the privatization of religion—is equally in error. With privatization, politics has the field to itself and becomes paramount. This is the twentieth century error on both the right and the left, Fascism and Communism, respectively.<sup>283</sup> By being the guardian of absolute truths, religion, to its followers, relativizes all else. By asserting absolutes, which is what religion does, the contingency of truths that are of lessee order (political truths) are blocked from their totalitarian impulse. Those members of society holding the most raw power—those with control of government's machinery—cannot, via their raw power, become absolute. Relativizing the political operates to expand that social space that is nongovernmental, and in turn to give breathing room to individuals, families, neighborhoods, schools, and other mediating groups.

Sociologist Peter L. Berger has explained how theism works to the benefit of democracy and of the state. When the state understands itself as limited, it will not attempt to provide the ultimate meanings to life that people find within religion. In totalitarian experiments, the state overreached and sought to fill the people's spiritual needs. This the state is incapable of doing. Berger began by observing that "a state that guarantees religious liberty" thereby "acknowledges, perhaps without knowing it, that its power is less than ultimate."<sup>284</sup> Berger then tied in how the government-religion separation is crucial to this role of restraining the nation-state. It is "an intriguing paradox," noted Berger, that if the church is to do this "secular service" of enhancing democracy and expanding human liberties, the church's contribution "*is possible only if religion itself remains otherworldly.*"<sup>285</sup> Religion, here, intends transcendence; it points to realities beyond the world of the ordinary and everyday life. This otherworldliness is

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Italian and German, have either discouraged or actively persecuted any religious organization whose members advocate the worship of God, rather than the worship of the deified state or the local political boss.

*Id.* at 309.

283. This is also the postmodernist error. Because postmodernists believe that there are no immutable principles to guide the nation, all societal decisions are relegated to the democratic political process. See Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2330-33 (1997) (presenting an impressive postmodernist jeremiad against the feigned neutrality of liberalism). But if there are no fixed truths to precondition politics, then there is no reason to be tolerant of others. Why then should those in political power bind themselves to the means and ends of democratic processes? Everything becomes possible. In the end, postmodernism ends up cannibalizing the culture that gave rise to it.

284. Peter L. Berger, *The Serendipity of Liberties*, in *THE STRUCTURE OF FREEDOM: CORRELATIONS, CAUSES & CAUTIONS* 1, 15 (Richard John Neuhaus ed., 1991); see also *supra* note 34 (quoting William Clancy and Max L. Stackhouse).

285. Berger, *supra* note 284, at 16; see HUXLEY, *supra* note 282, at 315-21 (giving an account of the spiritual authority of a church leader dissolving with his new focus on political concerns).

intrinsic to the very definition of most Western systems of religion (and many outside the West), and it is why religion attracts human interest in the spiritual and, for many, inspires ultimate allegiance.<sup>286</sup>

When religions, or their institutions, abandon this focus on the “wholly other” and embark on mimicking organizations with trendy social or political agendas, then people, maintained Berger, lose interest in those religions.<sup>287</sup> This worldly use of religion to limit the state, he argued:

[W]ill diminish to precisely the degree that religious institutions themselves become more worldly . . . . The religious institution that becomes indistinguishable from other institutions, such as political lobbies or therapeutic agencies or radical caucuses (or, needless to add, conservative caucuses), in very short order has great difficulty answering the question of why it should exist as a separate institution at all.<sup>288</sup>

The numbers indicate that people lose interest in religion when churches let the things of this world set their agenda. Churches making primary their “social relevance” to the here-and-now are in decline, whereas those that keep central their focus on the transcendent are growing.<sup>289</sup> This is not to say that religious organizations should eschew engagement in social work or oppose official injustice as they see it. If led in those directions, religious communities should pursue the prophet’s call. But when political activism becomes their overweening preoccupation, then the observed pattern is that such religious organizations wither.<sup>290</sup> If that development comes to pass, such churches are too weak to serve as a counterweight to the modern affirmative state.

For both secular and religious reasons, then, care should be taken so that governmental programs do not transform ecclesiastical organizations into little more than societies for social betterment. Justice Blackmun, concurring in *Lee v. Weisman*,<sup>291</sup> linked the vitality of religion and democracy with these words:

The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty. Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more relig-

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286. Berger, *supra* note 284, at 14-15; see also Carter, *supra* note 259, at 1637-38.

287. Berger, *supra* note 284, at 16.

288. *Id.*

289. DEAN M. KELLEY, WHY CONSERVATIVE CHURCHES ARE GROWING: A STUDY IN SOCIOLOGY OF RELIGION 20-35, 87-153 (1962).

290. HUXLEY, *supra* note 282, at 298-321 (observing that the spiritual authority of a church leader dissolved with his new focus on political concerns); Carter, *supra* note 259, at 1636-37, 1660 (drawing on the writings of Soren Kierkegaard).

291. 505 U.S. 577 (1992).

ious, by keeping their respective functions entirely separate.<sup>292</sup>

Out of concern for religion, the Establishment Clause has a role in preventing those forms of governmental sponsorship that may turn churches into mere franchises for implementing the current social agenda of the state. In turn, democracy has a stake in the Establishment Clause protecting religion from its own bad choices, to the end that religion—at least religion that intends transcendence and calls its followers to ultimate allegiance—thereby has the vitality to limit the state.

### C. CIVIL RELIGION

In addition to voluntarism and the notion of a limited state is the hazard of cultural religion.<sup>293</sup> Cultural religion is the confusion of genuine religious faith with one's pride in tradition, love of country, and the badge of having entered into full acceptance as a citizen of a nation. It is the elevation of certain ceremonies, holidays, and other habits of a nation, all good in themselves, to the level of the sacred. Concomitantly, certain sacraments and holy days of the church come to be regarded as rites of passage in proper civic life. In this blurring of the line between religion and civic culture, it is genuine religion, observed Justice Brennan, that is the likely loser: "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."<sup>294</sup> Cultural religion, then, is the conflating of religious piety with sentimentality for the nation. In its extreme, sociologists term this phenomenon "civil religion," which comes about when the predominant religion is so closely merged with national self-identity that patriotism and nationalism march hand in hand with spirituality.<sup>295</sup> Garry Wills, in a biting commentary that leaves no

292. *Id.* at 606 (Blackmun, J., concurring) (internal quotations and citations omitted).

293. See PETER L. BERGER, *THE NOISE OF SOLEMN ASSEMBLIES: CHRISTIAN COMMITMENT AND THE RELIGIOUS ESTABLISHMENT IN AMERICA* 39-57 (1961) (describing cultural religion of late 1950s American Protestantism); John A. Lapp, *Civil Religion Is But Old Establishment Writ Large*, in *KINGDOM, CROSS AND COMMUNITY* 196 (John Richard Burkholder & Calvin Redekop eds., 1976) (discussing Anabaptist concern with civil religion as shaping their view of church-state relations). See generally AMERICA, CHRISTIAN OR SECULAR? READINGS IN AMERICAN CHRISTIAN HISTORY AND CIVIL RELIGION (Jerry S. Herbert ed., 1984); ROBERT LINDER & RICHARD PIERARD, *TWILIGHT OF THE SAINTS: BIBLICAL CHRISTIANITY & CIVIL RELIGION IN AMERICA* (1978).

294. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring); see also *Marsh v. Chambers*, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) ("[One] purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government.")

295. Wilber G. Katz & Harold P. Southerland, *Religious Pluralism and the Supreme Court*, in *RELIGION IN AMERICA* 269, 273-74 (William G. McLoughlin & Robert N. Bellah eds., 1968); Frank Staff, *Rendering to Caesar What Belongs to Caesar: Christian Engagement with the World*, 18 J. CHURCH & ST. 95 (1976) (Civil religion's "primary reference is to the state which assumes properties, functions, or claims of religion, but it applies also to religion which knowingly or

doubt that in his view the church has sold out, surveyed the American landscape in these words:

[R]eligion plays a very political role here. By acquiescing in the standards of our rulers, the churches give them tacit endorsement . . . .

. . . Thus is religion trapped, frozen, in its perpetual de facto accommodation of power. It becomes a social ornament and buttress, not changing men's lives, only blessing them . . . . Religion is invited in on sufferance, to praise our country, our rulers, our past and present, our goals and pretensions, under the polite fiction of praying for them all. The divine is subordinated to the human—God serves Caesar. This is what Americans quaintly call “freedom of religion,” and what the Bible calls idolatry.<sup>296</sup>

As the author of *Schempp*, Justice Clark faced a firestorm of criticism from short-sighted religionists. His response was that the critics ought not to be dismayed but relieved, for it is religion that “gets hurt when there is a confusion of patriotism with genuine religion.”<sup>297</sup> Thus, Justice Clark defended *Schempp* not in terms of the result being good for nonreligious people or those of minority faiths, but as being good for mainline religions that hope to retain their integrity.

Civil religion is used to rationalize away as not “inherently religious” what are otherwise clear violations of the Establishment Clause. For example, the Court has passed off prayers by legislative chaplains<sup>298</sup> and governmental displays depicting the birth of Jesus Christ<sup>299</sup> as practices that are not religious. Civil religion is the culprit and authentic religion the inevitable victim.

The chaplaincy and Christmas-display cases were decided over dissents by Justices that saw the long-term consequence of mistaking religion for agreeable traditions. In *Marsh v. Chambers*,<sup>300</sup> a case challenging the constitutionality of using prayer to open state legislative sessions, Justice Brennan said that one of the purposes of the Establishment Clause “is to prevent the trivialization and degradation of religion by too close an attachment to

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unknowingly worships the state or accords to it status, function, or authority beyond the proper limits of [the] state.”). A renewed interest in civil religion was initiated by Robert N. Bellah's essay *Civil Religion in America*, which is reprinted, together with chapters both for and against it, in *AMERICAN CIVIL RELIGION*, *supra* note 227.

296. GARRY WILLS, *BARE RUINED CHOIRS: DOUBT, PROPHECY, AND RADICAL RELIGION* 259-60 (1972).

297. Tom C. Clark, *Religion and the Law*, 15 S.C. L. REV. 855, 863-64 (1963).

298. *Marsh*, 463 U.S. at 791 (upholding practice of hiring chaplain for the offering of prayers in the state legislature).

299. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding government display of the nativity of Christ as part of larger holiday display); cf., e.g., *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 620-21 (1989) (upholding public display of menorah but disallowing nativity of Christ).

300. 463 U.S. 783.

the organs of government."<sup>301</sup> Others on the Court have opposed December holiday displays, inter alia, out of concern for protecting religion from acculturation.<sup>302</sup> In the context of disputes over religious symbols, the fear was the exploitation of a nativity of Jesus for the purpose of Christmas retail marketing. The degradation of the nativity was compounded when the Court majority characterized the Christian symbol as little more than an agreeable tradition indistinguishable from a Santa house, a reindeer-drawn sleigh, or a talking wishing well.<sup>303</sup>

Vibrant religion often defines itself in opposition to culture. Indeed, sociologists have observed that in certain respects religion needs to be in tension with or resistant to the prevailing course of culture.<sup>304</sup> When a religion assumes the role of a political party or takes up the reins of civil power, it loses its energizing distinctiveness and apartness. Tocqueville had seen this happen with Christianity in his native France:

[I]n forming an alliance with a political power, religion augments its authority over a few and forfeits the hope of reigning over all.

....

The unbelievers of Europe attack the Christians as their political opponents rather than as their religious adversaries; they hate the Christian religion as the opinion of a party much more than as an error of belief; and they reject the clergy less because they are representative of the Deity than because they are the allies of government.<sup>305</sup>

To become wholly comfortable with the culture is to threaten the long-term survival of the religion. A right ordering of government and religion can avoid a civil religion that anesthetizes individuals from the felt urgency of making religious decisions.<sup>306</sup> In short, the Establishment Clause works on

301. *Id.* at 804-05 (Brennan, J., dissenting).

302. *Allegheny*, 492 U.S. at 643-44 (Brennan, J., concurring in part and dissenting in part); *id.* at 650-51 (Stevens, J., concurring in part and dissenting in part); *Lynch*, 465 U.S. at 712, 725 (Brennan, J., dissenting); *id.* at 727 (Blackmun, J., dissenting).

303. *Lynch*, 465 U.S. at 712 (Brennan, J., dissenting); *see also id.* at 725 ("[T]he Framers of the Establishment Clause understood that religion is too personal, too sacred, too holy to permit its unhallowed perversion by civil authorities.") (citation and internal quotations omitted); *id.* at 727 (Blackmun, J., dissenting) ("[The nativity scene] has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display."); Laycock, *supra* note 75, at 380 ("Government by its sheer size and prominence will have a disproportionate influence on the kinds of rituals that are exercised and on public perception of what are appropriate rituals . . . . Government-sponsored religion is theologically and liturgically thin. It is politically compliant. It is supportive of incumbent administrations . . . . In tolerant communities, efforts to be all-inclusive inevitably lead to desacralization . . . .").

304. Carter, *supra* note 259, at 1636-39.

305. TOCQUEVILLE, *supra* note 85, at 310-14.

306. Civil religion can also be harmful to voluntary faith when it tries to move outside the favoring nation. Religious bodies claim to be universal; thus they make appeals to potential

behalf of voluntary religion.<sup>307</sup>

#### D. A CAPTIVE CHURCH

The final reason government–religion separation is good for religion is that it forestalls a loss of control by churches over their schools and social welfare ministries. A church that receives government sponsorship is vulnerable to having its ministries redirected to ends dictated by government policy and enforced by regulatory controls attached to the state funding.<sup>308</sup> In *Lemon v. Kurtzman*,<sup>309</sup> the Court warned what can happen if a church-related school indiscriminately enters into a partnership with government:

[T]he program [being reviewed] requires the government to examine the school's records in order to determine how much of the total expenditure is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" in *Walz v. Tax Commission* . . . and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with Religion Clauses.

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The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and

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followers that do not stop at national boundaries. But the peoples of other countries understandably resist the teachings of the national established church because they mistake it for either an instrument to advance the cultural hegemony of the nation or as a tool to serve the foreign policy aims of a colonizing government.

307. See generally JOHN C. BENNETT, *CHRISTIANS AND THE STATE* 217-25 (1958) (summarizing arguments for why it is better for the churches not to be established as a state church).

308. Congress recognized the importance to religious organizations of limiting hiring to coreligionists in order to maintain control over the direction of their ministries and remain faithful to their defining doctrines. See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions . . ."); see also *id.* at 342-43 (Brennan, J., concurring in the judgment) (stating that religious organizations may condition employment on an applicant's religion).

309. 403 U.S. 602 (1971).

to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.<sup>310</sup>

This is not to say that all (or even most) governmental funding to faith-based institutions violates the Establishment Clause. It is to say that the program, its attendant oversight, and the nature of the aid must be designed to prevent this intrusion by government into religion's sphere.<sup>311</sup>

Religious ministries are often motivated by unselfish love of neighbor, not a desire to serve the policy aims of government. Churches should be moved by the promptings of their faith and ennobling self-sacrifice, not political initiatives by government. Once the church is responding more to state policy goals than to the teachings of its own lights, spontaneity is dulled and the fervor and allegiance of its workers wane.<sup>312</sup> In turn, as the Court has observed, those outside the religion respond with disrespect and derision:

The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.<sup>313</sup>

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310. *Id.* at 620-22; see *Marsh v. Chambers*, 463 U.S. 783, 803-04 (1983) (Brennan, J., dissenting) ("[One] purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.") (footnotes omitted).

Intense monitoring of religious activities by government officials is "excessive entanglement" and thereby violative of the Establishment Clause. *Agostini v. Felton*, 521 U.S. 203, 234-36 (1997) (acknowledging the Clause's prohibition on excessive monitoring, but holding that evidence of such monitoring in this particular case was absent). For numerous examples of regulatory entanglement that accompanied governmental benefit programs, see CARL H. ESBECK, *THE REGULATION OF RELIGIOUS ORGANIZATIONS AS RECIPIENTS OF GOVERNMENTAL ASSISTANCE* 11-39 (1996); JOE LOCONTE, *SEDUCING THE SAMARITAN: HOW GOVERNMENT CONTRACTS ARE RESHAPING SOCIAL SERVICES* (1997).

311. For an argument concerning permitted and prohibited programs of financial aid, see *infra* notes 376-411 and accompanying text.

312. See Robert Booth Fowler, *A Skeptical Postmodern Defense of Multiestablishment: The Case for Government Aid to Religious Schools in a Multicultural Age*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS*, *supra* note 96, at 167, 184:

Even if [complete government control] does not occur, critics fear that as government assistance grows, the sense of conviction and sacrifice within communities sustaining religious schools will inevitably ebb. With it may depart the very life of the religious community that was the reason for establishing the parochial school in the first place.

*Id.*

313. *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (footnote omitted).

When religious groups enter into partnerships with government, the relationship, unless properly structured, is inherently unequal. Government will attempt to dominate the terms of the "cooperation." Churches always have the option of turning away the money if they think the regulations become too intrusive. But pulling out of a program is not always feasible if a ministry has come to depend on the government funding.

Governmental funds are in a sense political monies.<sup>314</sup> A recipient of political money may be deterred from acting to undermine the status quo. Consequently, the churches find themselves posing a diminished counterwitness to the political standing order. Churches should guard against becoming tepid in their critical witness to those in power. In extreme cases churches have found themselves in complete servility to the state. The Church of England, for example, used to be mocked as the Tory Party at prayer. Churches should consider their role, albeit a secondary one, as champions for justice. If churches are to speak prophetically and thereby criticize and shape governmental policy, they must remain unshackled from civic control. Try as they might, institutionally subservient churches inevitably are reduced to mere chaplaincies, echoing the political rhetoric of either the left or the right.<sup>315</sup>

Constitutional structure, among its other virtues, separates the two centers of authority and protects the integrity of both. When the Establishment Clause is viewed as structural, it then makes sense that one of its tasks is to protect the integrity of religion. As discussed in this Part, the no-establishment principle does so to the benefit of voluntaristic religion and to the benefit of limited government. Part VI begins to sort out the ramifications to conventional First Amendment understandings when the Establishment Clause is applied as a structural restraint.

#### VI. THE CONSEQUENCES OF REGARDING THE CLAUSE AS STRUCTURAL

Openly applying the Establishment Clause as a structural, rather than a rights-based, clause would bring about a shift in how judges and litigants conceptualize problems involving government-religion relations. The question explored in this Part is whether the Supreme Court's controlling cases come out any differently as a consequence of this new paradigm. Given that the principal argument of this Article is that in several instances the modern Court has sub silentio applied the Establishment Clause as structural, it would be expected that the number of overall changes in final

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314. Justice Jackson, dissenting in *Everson v. Board of Education*, 330 U.S. 1 (1947), noted: Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it.

*Id.* at 27.

315. See *supra* text accompanying notes 277, 288, 294, 296, 297, and 305 (marshalling views concerning how religion can be hurt by improper relationships with government).



results (as opposed to expressed rationale) would not be great. That indeed turns out to be the case. However, the ones that would change are important. Moreover, because the Court's First Amendment doctrine has at times placed the Establishment Clause in conflict with the Free Exercise and Free Speech Clauses, a most welcomed analytical change flowing from a structuralist view is that the Court would avoid these imagined "tensions" fall away.<sup>316</sup> Finally, in *Employment Division v. Smith*<sup>317</sup> the Supreme Court cut back on the scope of the Free Exercise Clause, and Congress's legislative attempt to restore the status quo ante was overturned in *City of Boerne v. Flores*.<sup>318</sup> With the loss of a vigorous free exercise principle, it is of no small importance that the Establishment Clause be reclaimed as a robust structural restraint on government:

#### A. WEIGHING THE IMPORTANCE OF RELIGIOUS PRACTICES

For reasons of simplicity, it is best to start with some rules of law that would not change under a structuralist view. The Supreme Court has held that matters of religious belief or practice need not be "central" to a claimant's faith to be protected by the First Amendment.<sup>319</sup> Indeed, the Court has said that judges have no authority to weigh the relative importance of religious words, practices, and events, neither against other practices of the same denomination nor against competing governmental interests.<sup>320</sup> As a parallel principle, the Court has held that claimants may disagree with coreligionists or be unsure or wavering, and still have their causes taken up for free exercise protection.<sup>321</sup> Additionally, in order not to wrongly attach juridical significance to an individual's sectarian affiliation, the Court has said that legislative classifications are not to turn on denominational membership.<sup>322</sup> The foregoing rules are part of a larger admonition by the Court that, whenever possible, governmental officials should eschew detailed inquiries into religious doctrine<sup>323</sup> and avoid probing the significance

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316. See *infra* notes 361-63, 365-68, 385-87, 414-17 and accompanying text (discussing the argument that the First Amendment Clauses are in "tension" and why that claim is false).

317. 494 U.S. 872 (1990); see *supra* note 31 and *infra* note 435 (discussing *Smith*).

318. 117 S. Ct. 2157 (1997) (holding unconstitutional the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), insofar as it regulated state action, because the legislation exceeded the power delegated to Congress in Section 5 of the Fourteenth Amendment).

319. See cases cited *supra* note 230.

320. See *supra* note 233.

321. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

322. The Supreme Court wants to avoid making church membership of legal significance for two reasons. First, membership, as well as denial of or removal from membership, are inherently religious decisions. Second, if this was not the rule of law, merely holding religious membership could result in a civil advantage. See cases cited *supra* note 234.

323. See *supra* notes 172-75, 199-203. The boundary-keeping role of the Establishment Clause requires that in one important respect the task of differentiating matters in the competence of government from those in the sphere of religion cannot be avoided. See *infra* Part VII.B. Indeed, performing that task is required in order to have a boundary at all.

of religious words, practices, and events. A shift to a structuralist view would not change these rules of law. The only change would be that the foundation for these rules would be explicitly attributed to the Establishment Clause.

This Article previously discussed the nondelegation rule, most prominently represented by *Larkin*,<sup>324</sup> the intrachurch dispute cases from *Watson* to *Milivojeovich*,<sup>325</sup> and the Court's use of two definitions of "religion,"<sup>326</sup> the latter depending on whether the parties to the dispute invoke the Free Exercise Clause or Establishment Clause. These three lines of case authority would not change under a structuralist application. Indeed, as argued previously, these three clusters of judicial precedent make sense only when no-establishment is regarded as a structural restraint.

Under the current case law, government cannot penalize sacrilege, blasphemy, or other activity that does no more than speak ill of another's religion.<sup>327</sup> Additionally, government cannot compel an individual, upon pain of material penalty, inconvenience, or loss of public benefit or advantage, to profess a religious belief or to observe an inherently religious practice.<sup>328</sup> Once again, these rules of law, long promulgated by the Court, would not change under a structuralist view. There would be no doubt, however, that the basis for these rules is the Establishment Clause rather than the Free Exercise Clause.

#### B. REGULATORY BURDENS ON RELIGIOUS ORGANIZATIONS

A structuralist perspective would resolve the conflict in the Supreme Court's cases dealing with generally applicable regulatory legislation, the burden of which falls on, among others, religious organizations. Given that a structuralist view reserves a sphere of autonomy for religious groups,<sup>329</sup> regulatory burdens that touch on matters in the religious domain (doctrine, polity, clerics, church membership) violate no-establishment. This is so, not as a matter of group or associational rights, but as a matter of government exceeding its jurisdiction as limited by the Establishment Clause.<sup>330</sup> Assume,

324. See *supra* notes 238-47 and accompanying text.

325. See *supra* notes 163-98 and accompanying text.

326. See *supra* notes 25-32 and accompanying text.

327. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (striking down a law permitting censorship of films that are "sacrilegious"); see also *Epperson v. Arkansas*, 393 U.S. 97, 107 n.15 (1968) (discussing blasphemy statute in dictum).

328. See *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (overturning oath declaring belief in God that was required as a prerequisite for public office); *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."). In the case of compelled profession of faith of an atheist, the purview of the Free Speech and Establishment Clauses overlap and complement each other. See *infra* note 425 (discussing how atheists and agnostics are protected by free speech and no-establishment principles).

329. See *supra* notes 172-75 and accompanying text.

330. See *supra* notes 220-23 and accompanying text (concluding that religious organizations have no specialized group or associational rights).

for example, that Congress enacts immigration legislation that denies visas to all nonresident aliens desiring to enter the United States and to secure permanent employment. On its face, the legislation is unquestionably constitutional as an exercise of power delegated to the federal government.<sup>331</sup> Now assume that Riverside Church in New York City wants to "call" as its new pastor a citizen and resident of England. The act has the effect of preventing Riverside Church from employing the cleric of its choice, hence the law intrudes into that sphere reserved to religion.<sup>332</sup> Because the legislation exceeds the restraint on congressional power set down in the Establishment Clause, the act, as applied to Riverside Church, should not be enforced. This was indeed the disposition in *Rector of Holy Trinity Church v. United States*,<sup>333</sup> albeit the Court devised a most unusual rule of statutory construction to reach that result rather than relying, as it should have, on the Establishment Clause.<sup>334</sup>

The Establishment Clause is never violated merely because a law, neutral in purpose, has an unintended impact on a particular church or religious practice.<sup>335</sup> Accordingly, the immigration legislation in this illustration does not violate the Establishment Clause because the law has a disparate effect on Riverside Church. Rather, the immigration legislation violates the Establishment Clause because the act interferes with the relationship between clergy and church. That relationship is in the exclusive sphere of religion. Moreover, the immigration legislation is not simply unconstitutional as applied to Riverside Church. Rather, the act is unconstitutional as to all religious organizations desiring to employ clerics not holding U.S. citizenship. That is how a structural clause operates: it gives class-wide relief to all religious organizations, in contrast with the victim-specific relief of a rights-based clause.<sup>336</sup> The immigration legislation remains enforceable, of course, as to nonreligious organizations.<sup>337</sup>

Under a structuralist perspective, then, legislators imposing regulatory burdens on the private sector must take care not to intrude on religious organizations' sphere of autonomy. The Supreme Court has reached this

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331. See U.S. CONST. art. I, § 8, cl. 4; *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (stating that the Alien Registration Act of 1940 was within the power of Congress).

332. See *supra* note 174 and accompanying text.

333. 143 U.S. 457 (1892).

334. *Id.* at 462 (adopting a rule of statutory construction that assumes, in absence of clear legislative intent to the contrary, that Congress meant to exempt churches, thereby avoiding the issue of church autonomy).

335. See *supra* note 30 (noting that when a secular purpose merely has a disparate effect on some religions but not others, the Establishment Clause is not violated).

336. See *supra* notes 154-62 and accompanying text (describing the nature of class-wide relief granted in Establishment Clause cases).

337. This autonomy is unique to religious organizations because the Establishment Clause restrains government's power only as to religion. Notwithstanding occasional speculations to the contrary, see *Howe*, *supra* note 210, at 94-95 (extending *Kedroff* to nonreligious groups), cases such as *Watson* and *Kedroff* do not stand for juridical autonomy for groups other than religious organizations.

result in its parochial school cases when adverse effects befell these schools as a result of unemployment compensation taxes<sup>338</sup> and mandatory collective bargaining laws.<sup>339</sup> However, the Court's rationale avoided dealing frontally with the issue of Congress exceeding its power. These cases would come out the same under a structuralist application but with ecclesiastical autonomy protected without any timidity in stating that such a result is required by the Establishment Clause.

In *Tony and Susan Alamo Foundation v. Secretary of Labor*,<sup>340</sup> a religious organization challenged federal maximum hour and minimum wage legislation as applied to the activities of an evangelistic and social welfare ministry. Because the legislation applied only to activities undertaken with a business purpose, the law had no impact on the normative ecclesiastical activities of a church or evangelistic society.<sup>341</sup> The U.S. Department of Labor sought wage and hour enforcement only for the ministry's far-flung operations including "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy."<sup>342</sup> The Supreme Court held that the Establishment Clause was not violated.<sup>343</sup> That result would be unchanged under a structuralist application. The boundary-keeping role of the Clause requires the drawing of a line between church and state—one that is fixed, not adjusted on a case-by-case basis depending on the vagaries peculiar to the specific religion in question.<sup>344</sup> Because the regulatory burden fell only on the business operations of a religious organization, matters of ordinary commercial character, the regulated activities were within the sphere of civil government and thus a proper object of legislation.

Unlike *Alamo*, *Jimmy Swaggart Ministries v. California Board of Equalization*<sup>345</sup> would be decided differently if no-establishment were viewed as a structural restraint. *Swaggart* involved a constitutional challenge to a state sales tax. The state sought to apply the tax to an evangelistic organization's sale of religious literature, tapes, and related merchandise.<sup>346</sup> Although the purchaser paid the tax, the seller (here, the evangelistic ministry) collected

338. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780-81 (1981) (applying rule of statutory construction that assumes, in absence of clear legislative intent to the contrary, that Congress intended to exempt all parochial schools).

339. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (adopting a rule of statutory construction that assumes, in absence of clear legislative intent to the contrary, that Congress intended to exempt all parochial schools).

340. 471 U.S. 290 (1985).

341. *Id.* at 305.

342. *Id.* at 292.

343. *Id.* at 305-06 (stating that record-keeping requirements of wage and hour law did not have the primary effect of inhibiting religion or creating an excessive entanglement between church and state).

344. See *supra* notes 29-32 and accompanying text.

345. 493 U.S. 378 (1990).

346. *Id.* at 381-82. There is, of course, no Establishment Clause problem with imposing a general tax on consumers of goods, some of whom are purchasers of religious goods.

and remitted the tax to the state. Because the ministry failed to collect the tax, it was principally liable to the state for the entire amount.

The *Swaggart* Court first inquired whether collecting the tax was a burden on the religious beliefs of the ministry, and found that it was not.<sup>347</sup> That way of framing the issue, as a right to be free of substantial religious burdens, comports with the Free Exercise Clause test under the case law before *Employment Division v. Smith*.<sup>348</sup> With a structuralist interpretation, the proper inquiry is jurisdictional: whether the government has legislative power over the activity in question. If the nature of the ministry's activity to which the tax is applicable is inherently religious, then the activity falls within that sphere reserved to the church—specifically, the communication of doctrine and other religious teaching directed to the faithful as well as the would-be proselyte. Because the tax indeed fell on acts of religious teaching and evangelism,<sup>349</sup> the state's use of its police power against the ministry invaded that zone of activity that the Establishment Clause reserves to religion.<sup>350</sup>

Refusing to respect the distinction made in *Alamo* between commercial and inherently religious activity,<sup>351</sup> the *Swaggart* Court held that collecting the tax from the ministry did not violate the Establishment Clause.<sup>352</sup> This was in error. When upholding property tax exemptions for religious groups in *Walz v. Tax Commission*,<sup>353</sup> the Supreme Court correctly said it no more

347. *Id.* at 384-92.

348. 494 U.S. 872 (1990) (holding that generally applicable legislation, neutral as to religion, does not violate the Free Exercise Clause notwithstanding a disparate effect on the religious practices of the claimant).

349. See *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (holding that a revenue law which imposed a tax on resident preachers who sold books of sermons for their support was a law regulating religious activity and thus violative of First Amendment); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding that sale of books of sermons by itinerant preachers was religious activity, thus not subject to flat license tax). A three-judge plurality in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), sought to "explain" *Follett* and *Murdock* by limiting their scope. *Id.* at 21-25. The reasoning is specious, but in any event a plurality cannot overrule *Follett* and *Murdock*.

Making an evangelistic association the tax collector for the modern affirmative state, as the sales tax law did in *Swaggart*, is also problematic because of the nondelegation rule. See *supra* notes 238-47 and accompanying text (discussing the rule of nondelegation).

350. The Establishment Clause is never violated just because a neutral law has a disparate impact on a religious organization or religious practice. See *supra* note 30, and text accompanying notes 335 and 344. Accordingly, the sales tax law is not violative of the Establishment Clause merely because the tax has a disparate effect on the evangelistic ministry in question. Rather, the sales tax violates the Establishment Clause because, as applied to religious organizations, the law touches upon the inherently religious activities of doctrinal teaching and evangelism. The tax may, of course, continue to be applied to sales by secular organizations.

351. *Swaggart*, 493 U.S. at 395. The Federal Unrelated Business Income Tax, 26 U.S.C. § 511 (1994), makes this distinction. Religious activity of religious organizations is not subject to income tax, but commercial activity of religious organizations is taxable. The issue is not "entanglement" as such, but disallowing intrusion into inherently religious matters while allowing intrusion into commercial matters.

352. *Swaggart*, 493 U.S. at 392-97.

353. 397 U.S. 664 (1970).

makes sense for the state to tax the church than it does for the church to tax the state.<sup>354</sup> Each is sovereign within its own sphere. A structuralist application would have had the *Swaggart* Court following the rationale in *Walz* and *Alamo*.<sup>355</sup>

### C. EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS

The current Supreme Court rule is that the government may refrain from imposing a regulatory burden on religion, even as it imposes the burden on others similarly situated.<sup>356</sup> Hence, this type of classification between religion and nonreligion (or even irreligion) is permitted. A structuralist perspective would not change that result. Indeed, it would strengthen the rule by giving the cases a more secure foundation in the power restraints of the Establishment Clause.

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354. Writing for an 8-1 majority, Chief Justice Burger said:

The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.

*Id.* at 675.

355. Institutional autonomy has its limits, of course, even when a church or other religious organization is acting on matters at the very core of its jurisdictional sphere. M. SEARLE BATES, *RELIGIOUS LIBERTY: AN INQUIRY* 301 (1945); Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1185 (1962). The oft-used example is of a religion that is acting on a supposed doctrine of child sacrifice. Other ready examples are fraudulent schemes promising miracle healings to physical ailments, and exhortations to followers to assault former members who, having "left the fold," are revealing insider secrets. Obviously, civil society has the ability to protect the most basic human needs for bodily safety and the security of property. "[W]ithin the sphere of religious associations' internal affairs, judicial abstention can never be absolute." BATES, *supra*, at 1185.

When the acts of the church are *malum in se*, the government may redress the wrongdoing by a civil rights prosecution or the imposition of tort liability for the church's intentional acts. *Cf. supra* notes 171, 199-201 (dismissing action because the claim is an ordinary tort, not an intentional tort *malum in se*).

356. See, e.g., *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (exempting religious employers from prohibitions on religious discrimination); *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972) (describing how exemption for religious organization from compulsory education law does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437, 460 (1971) (upholding a religious exemption from military draft for those who oppose all war does not violate Establishment Clause); *Walz*, 397 U.S. at 673 (upholding a property tax exemption for religious organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding a program for student release from compulsory education to attend religious exercises off public school grounds); *Arlan's Dep't Store v. Kentucky*, 371 U.S. 218 (1962), *Commonwealth v. Arlan's Dep't Store* 357 S.W.2d 708 (app'l dismissed for want of a sub'l fed'l question) (holding that a religious exemption from a Sunday closing law is not violative of the Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918) (upholding military service exemptions for clergy and theology students); *cf. Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 24-25 (1989) (plurality opinion) (striking down a sales tax exemption benefiting the sale of sacred literature).

*Corporation of the Presiding Bishop v. Amos*<sup>357</sup> is the leading case. *Amos* upheld an exemption for religious organizations in federal civil rights legislation. The civil rights act in issue prohibited employers generally from discriminating on the basis of religion, but religious employers were exempt. Rejecting the argument that such exemptions unconstitutionally advance religion, the Court said it is proper for Congress "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions."<sup>358</sup> A better definition of a structuralist view could hardly be written. The rationale in favor of exemptions is two-fold. First, to have "established" a religion connotes that government must have played some active role ("Congress shall *make* no law . . .") in bringing about that which is forbidden. Conversely, for government to passively leave religion where it found it logically cannot be "mak[ing]" a law with respect to religion.<sup>359</sup> Second, to enhance the desired separation, reduce civic-religion tensions, and minimize government-religion interactions are all justifications that make the boundary-keeping role of the Establishment Clause easier. These rationales suggest a jurisdictional division between government and religion of which regulatory exemptions are just the technical acknowledgement of the prior constitutional settlement.

Some have argued that exemptions from regulatory burdens for religious organizations<sup>360</sup> violate the no-establishment principle by advancing religion.<sup>361</sup> The argument belies a view of the Establishment Clause either as requiring government to affirmatively work against religion or as granting an individual right to be free *from* religion. This makes no sense. Extension of this line of reasoning culminates in the argument that by protecting the free exercise of religion the government is advancing religion, thereby violating the no-establishment principle. That "logic" leads to the Free Ex-

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357. 483 U.S. 327.

358. *Id.* at 335.

359. See Laycock, *supra* note 182, at 1416 ("The state does not support or establish religion by leaving it alone."). *Amos* also makes it clear that for a government to "refrain from imposing a burden" is logically no different from "lifting a burden" imposed in the past. In *Amos*, a burden first imposed in 1964 was lifted in 1972. *Amos*, 483 U.S. at 335-36; see also *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment) (discussing lifting government-imposed burdens as part of an accommodation analysis).

360. *Amos* and *Walz* are most explicit in making the salient distinction between governmental benefits and regulatory burdens. See *Amos*, 483 U.S. at 327 ("A law is not unconstitutional simply because it *allows* churches to advance religion." The *Lemon* test is violated only when, "government *itself* has advanced religion through its own activities and influence."); *Walz*, 397 U.S. at 673 ("We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions."). The special availability of a governmental benefit raises a more difficult Establishment Clause claim than government refraining from the imposition of a burden. See *infra* notes 377-411 and accompanying text.

361. See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 592-96, 611-12 (1991); William P. Marshall, *The Case Against Free Exercise Exemptions*, 40 CASE W. RES. L. REV. 357, 388-94 (1990).

ercise Clause being violative of the Establishment Clause!<sup>362</sup> An accurate statement of the Court's rule is that the government cannot intentionally discriminate *against* religion. The rule is not one of blind equality as between religion and nonreligion, as the Court correctly held in *Amos*.<sup>363</sup> To spare religious organizations regulatory burdens on their ecclesiastical endeavors, effectively "leaving the church where the government found it," is to facilitate the boundary-keeping role of the Establishment Clause. That role is not one-sided. Half of the reason for the boundary-drawing is to keep the state out of the church.

#### D. SPEECH OF RELIGIOUS CONTENT

During the 1980s and 1990s, in an unbroken line of victories for freedom of speech, the Supreme Court held that the religious expression of individuals and religious organizations was entitled to the same high protection accorded nonreligious expression (e.g., speech of political, artistic, or educational content).<sup>364</sup> Although the Free Exercise Clause grants no preference to private religious expression,<sup>365</sup> the Free Speech Clause calls for equal treatment. No-aid separationists framed their challenge as a clash of two First Amendment rights: the right under the Free Speech Clause to freedom of religious expression without discrimination versus an Establishment Clause right to a government that does not aid religion (the aid here taking the form of the use of public property to convey a religious message). With the issue so framed, no-aid separationists invited the Court to balance the conflicting Clauses hoping to tip the scale in the direction of their bias for a public square denuded of all religion. They lost. However,

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362. Justice White warned against such absurdities when he observed in *Welsh v. United States*, 398 U.S. 333, 372 (1970) (dissenting opinion), that the Free Exercise Clause is itself a law that by its express terms exempts religion from certain civic duties. Although the government cannot intentionally favor secular activity over religious activity, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in certain instances government can choose not to burden religious activity by regulations or taxes when others are so burdened, *Amos*, 483 U.S. at 335.

363. Writing for a unanimous Court in *Amos*, Justice White said: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.

364. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (finding viewpoint discrimination in university's denial of printing costs for student-initiated religious publication); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (finding content-based discrimination against religious speech in public forum was not justified by Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding content discrimination); see *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding Equal Access Act, legislation that prohibits discrimination against religious speech at public high schools).

365. *Heffron v. International Soc'y of Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981) (upholding the regulation of solicitation at state fair grounds, including that carried on by religious organizations).



as they had urged, the Court did frame the issue in such a way that Establishment Clause compliance could, in theory at least, supply a "compelling interest" for subjugating the Free Speech Clause. A structuralist perspective would reach the same result—namely equal access for religious expression—but reject framing the issue as a "clash between the Clauses."

*Capitol Square Review and Advisory Board v. Pinette*<sup>366</sup> is illustrative of the Supreme Court's analysis creating an unnecessary "tension" between the Free Speech Clause and the Establishment Clause. In *Pinette*, a state had created a public forum in a park by allowing citizens to erect temporary displays symbolizing their groups' message. But when the Ku Klux Klan sought permission to erect a Latin cross during the Christmas season, state officials balked. The Klan then sued for impairment of its free speech rights and eventually won.

The Supreme Court said that when speech is of religious content or viewpoint, and hence protected from discrimination by the Free Speech Clause, compliance with the Establishment Clause could provide a compelling governmental justification for suppressing the speech.<sup>367</sup> This makes no sense. There is nothing in the text of the First Amendment that suggests that when Clauses ostensibly conflict, the Establishment Clause overrides the Free Speech Clause. One could just as arbitrarily presume that the Free Speech Clause preempts the Establishment Clause.<sup>368</sup> What the Court ought to conclude from this apparent "tension" is that it has taken a wrong turn when interpreting one or both Clauses.

This "battle of the Clauses" goes away when the Establishment Clause is conceptualized as a structural restraint. If the speaker is private rather than governmental, then the Free Speech Clause supplies a right of equal access to the forum, and the expression cannot be suppressed simply because it is religious. There is never any "tension" with the Establishment Clause, real or apparent, for that Clause is a restraint on government rather than on private actors. Hence, a court's task in cases like *Pinette* is to first determine if the speaker is private or governmental. If private, then the Establishment Clause is irrelevant. If governmental, then the individual-rights orientation of the Free Speech Clause is irrelevant. One First Amendment Clause is never "balanced" against the other.

There will be cases, of course, in which it is a close call whether the speech of a private individual is adopted by the government as its own. If the facts are such that the speaker is private but the government is doing

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366. 515 U.S. 753.

367. *Id.* at 761-62, 783 (O'Connor, J., concurring in the judgment). The *Pinette* Court went on to hold that on these facts, the Establishment Clause was not violated by the presence of the Latin cross in the park. *Id.* at 770. Hence, the state was ordered to permit the display on the same basis as all other displays permitted in the park. *Id.*

368. See *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values."). A wit might suggest to the Court that the Clauses, being equally fundamental, cancel each other out. That arithmetic leaves the Court with zero law on the subject!

something to place its power or prestige behind the message, then the no-establishment restraint still applies.<sup>369</sup> The remedy, however, should not aim to suppress the private speech as such, but instead to enjoin only those governmental actions that are uniquely endorsing the private religious message.

The rules are altogether different when the religious speech is not private but fairly attributed to government or its officials. The government itself has no free speech rights.<sup>370</sup> Rather, government has a duty to see to it that its actions conform to the restraints on its power set down in the Establishment Clause. In accord with this boundary-keeping role, the Supreme Court has held that government may neither confess inherently religious beliefs<sup>371</sup> nor advocate that individuals profess such beliefs or observe such practices.<sup>372</sup> Government may acknowledge the role of religion in society and teach about its contributions to, for example, history, literature, music, and the visual arts.<sup>373</sup> However, the limit imposed by the Establishment Clause is exceeded when the government's expression places its imprima-

369. See *Treen v. Karen B.*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) (holding that statute authorizing student volunteers to lead classroom prayer in public schools violates Establishment Clause).

370. Nor does the Free Exercise Clause allow the government at the behest of the political majority to impose religion on all others: "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). Consequently, there is no conflict here between the Establishment Clause and Free Exercise Clause either.

371. For examples of cases in which government was unconstitutionally confessing inherently religious beliefs, see *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (dealing with public display of nativity of Jesus as the Messiah); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (dealing with the posting of Ten Commandments in school classrooms). But compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding nativity of Jesus situated among other holiday displays).

372. For examples of cases in which government was unconstitutionally advocating that individuals profess inherently religious beliefs or that they observe such practices, see *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching creationism); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (encouraging prayer); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (prohibiting teaching evolution); *Schempp*, 374 U.S. 203 (prayer and devotional Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (teacher-led prayer); *McCullum v. Board of Education*, 333 U.S. 203 (1948) (facilitating the teaching of religion). But compare *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative chaplain and prayer).

There are narrow exceptions to this rule in situations in which government has isolated individuals from their religious community, such as in the armed forces or in prison. In these "special environments," government may bring religion to individuals because government is responsible for the individuals' inability to obtain the requisite religious services at their own initiative. *Schempp*, 374 U.S. at 299 (1963) (Brennan, J., concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion."); Wilber G. Katz & Harold P. Southerland, *Religious Pluralism and the Supreme Court*, 96 DAEDALUS 180, 186 (1967) (same).

373. *Edwards*, 482 U.S. at 606-08 (Powell, J., concurring); *Schempp*, 374 U.S. at 225; *McCullum* 333 U.S. at 235-38 (Jackson, J., concurring).

tur on a religion or on an inherently religious belief or practice.<sup>374</sup> A structuralist view would not change the result in any of these cases.<sup>375</sup>

### E. GOVERNMENTAL AID TO RELIGION

Governmental aid to religion takes both direct and indirect forms. The Supreme Court has analyzed these two forms somewhat differently. With indirect aid, the government confers a benefit on private individuals who in turn exercise personal choice in using their governmental benefit at similarly situated organizations, whether public or private, religious or nonreligious. If some individuals choose to "spend" their benefit at a provider of services that also happens to be religious in character, arguably religion is thereby advanced. Nevertheless, when this occurs, the Court has determined that the Establishment Clause is not violated.<sup>376</sup>

The rationale for this rule is two-fold. First, the constitutionally salient cause of any indirect benefit to religion is the self-determination of numerous individuals, not a choice by the government.<sup>377</sup> Merely enabling private choice—where individuals may freely choose or not choose services from a religious provider—logically cannot be a governmental establishment of

374. The government's imprimatur can, of course, be on symbolic speech such as a religious display on public property. See *supra* note 371.

375. Under a structuralist application, then, the Supreme Court's principles of law concerning religious propagation in public schools would not change. Classroom prayer and devotional Bible reading by school officials would continue to be prohibited. Similarly, although public schools cannot teach religion, they may teach about religion.

376. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (providing special education services to Catholic student not prohibited by Establishment Clause); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student choosing to use grant for training as a cleric); *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983) (upholding a state income tax deduction for parents paying school tuition); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding loan of secular textbooks to parents of school-age children); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upholding a state law providing reimbursement to parents for expense of transporting children by bus to school, including parochial schools); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (upholding state loan of textbooks to parents with students enrolled in school, public and private). Even the Justices on the Supreme Court who dissented from its most recent ruling upholding governmental benefits for religious groups concede that nondiscriminatory programs of indirect aid do not violate the Establishment Clause. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 879-81 (1995) (Souter, J., dissenting) (distinguishing indirect from direct funding of religious institutions and acceding to the constitutionality of the former); see also *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972), *app'l dismissed for want of a sub'l fed'l question*, 413 U.S. 902 (1973). *Durham* was dismissed on the same day the Court decided *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (striking down a program that aided only private schools). In *Durham*, the state court upheld a student loan program wherein students could attend the college of their choice, religious or secular, public or private. *Durham*, 182 S.E.2d at 203-04. Similarly, the Court in *Nyquist* indicated that educational assistance provisions such as the G.I. Bill do not violate the Establishment Clause even when some students choose to attend church-affiliated colleges. *Nyquist*, 413 U.S. at 782 n.38.

377. *Mueller*, 463 U.S. at 399, 400.

religion. Second, the indirect nature of the aid reduces government-religion interaction and government's oversight and regulation of faith-based service providers. This enhances the institutional separation of government and religious organizations that is desirable from the perspective of the boundary-keeping task of the Establishment Clause.<sup>378</sup> Under a structuralist application, these indirect funding cases would not change.<sup>379</sup>

Governmental programs that provide direct aid to the private sector are, in the Court's view, a different matter. A structuralist perspective would facilitate a change in this case law, as well as much needed clarification and simplification. Direct-aid programs, funded out of general revenues,<sup>380</sup> must have a secular purpose, typically the improvement of education, health care, or social welfare. The question is whether faith-based organizations<sup>381</sup> can fully participate in such programs on an equal basis with other providers,<sup>382</sup> or if they must be barred from participation because

378. *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970).

379. There are numerous familiar programs that illustrate the rule stated in the text. *See e.g.*, Federal Pell Grants, 20 U.S.C. § 1070a (1994) (providing federal aid to students attending their college of choice, including those affiliated with a church); 26 U.S.C. §§ 170, 501(c)(3) (1994) (allowing individual income tax deductions for contributions to charitable organizations, including those that are religious); Post-Vietnam Era Veterans' Educational Assistance, 38 U.S.C. §§ 3201-3243 (1994) (creating the G.I. Bill); Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (Supp. II 1996) ("charitable choice" provision in the recent federal welfare reform legislation permitting vouchers); The Child Care and Development Block Grant Act of 1990, 42 U.S.C. §§ 9858-9858q (Supp. II 1996) (providing federal child care certificates for low-income parents enrolling their child in preschool).

In the Church Arson Prevention Act, Pub. L. 104-155, § 110 Stat. 1394 (1996), signed by President Clinton on July 3, 1996, Congress made use of the neutrality principle. Section 5 of the Act provides for nonprofit organizations exempt under § 501(c)(3) of the Internal Revenue Code, who out of racial or religious animus are victims of arson or terrorism, to obtain federally guaranteed loans through private lending institutions. This means churches can obtain the necessary credit to repair or rebuild their houses of worship, and can do so at reduced interest rates. The Act, quite sensibly, treats churches like all similarly situated exempt nonprofit organizations. The secular purpose is to assist the victims of crime. The federal guarantee is a form of direct aid to religion, albeit aid neutrally available to all § 501(c)(3) organizations.

380. There is no dispute over whether the Establishment Clause prohibits a tax or user fee expressly earmarked for a religious purpose. It clearly does. *See Rosenberger* 515 U.S. at 853, 857 n.1 (Thomas, J., concurring) (suggesting a distinction between tax money earmarked for religious use and tax money from general revenues being used for a secular purpose by a religious organization); Laycock, *supra* note 75, at 376-77 (same). What remains in dispute is whether using money collected by general taxation and appropriated to support a welfare program that does not discriminate against the participation of faith-based providers is permitted by the Establishment Clause.

381. It is assumed, of course, that faith-based providers otherwise satisfy all legitimate eligibility criteria, such as possessing the ability to deliver the secular services with the requisite proficiency and economy.

382. There is no dispute over whether the Establishment Clause prohibits governmental programs available solely to faith-based providers. It clearly does. *See Board of Educ. v. Grumet*, 512 U.S. 687, 702-08 (1994) (holding that legislation favoring one particular religious sect is unconstitutional); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989) (plurality

they are religious.

Neutrality<sup>383</sup> between religion and nonreligion calls for equal treatment of all providers.<sup>384</sup> Indeed, it would seem that the Free Exercise Clause prohibits government from designing programs of aid that intentionally discriminate on the basis of religion.<sup>385</sup> By that measure, a rule of equal treatment of faith-based schools, as well as health care and social service providers, requires that these religious organizations be fully eligible for direct programs of aid. Conversely, the no-aid view held by some separationists would have the Establishment Clause bar religious organizations from participating in these direct-funding programs.

Once again no-aid separationists frame the issue such that two First Amendment Clauses are in apparent conflict. The resulting "tension" between free exercise and no-establishment principles, they propose, is to be relieved by tipping the balance in the direction of no-aid.<sup>386</sup> Again, this makes no sense. It is not consistent with the First Amendment's text because neither Clause has primacy over the other. Moreover, such conflicts are not inherent to the Religion Clauses and thereby logically unavoidable.<sup>387</sup> From a structuralist view, there is no "battle of the Clauses," as will be shown below.

The Supreme Court has steered an uneven course between the com-

opinion) (exempting religious periodicals from sales tax if published for the purpose of promulgating the faith violates the Establishment Clause); *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 764 (1995) (arguing, in dicta, to effect that government discrimination in favor of private religious expression or activity would be violative of Establishment Clause).

383. There is no claim that the principle of law here is substantively neutral, hence, the term "neutrality" (also "neutrality principle" and "neutrality theory") is perhaps better described as a rule of "equal treatment" or "nondiscrimination." Nonetheless, the Justices of the Supreme Court are using variations on "neutrality," so I follow their lead.

384. It is within the government's power, of course, to support only its own governmental schools and welfare agencies. Moreover, supporting government schools alone is not violative of the Free Exercise Clause rights of parochial school parents. *Lutkemeyer v. Kaufmann*, 364 F. Supp. 376 (E.D. Mo.), *aff'd mem.*, 419 U.S. 888 (1974) (upholding free bus transportation for public school students only); *Brusca v. State Bd. of Educ.*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972) (stating that the availability of free public education does not obligate a state to provide free education to students enrolled in private schools).

385. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *McDaniel v. Paty*, 435 U.S. 618 (1978).

386. For an example of this needless "conflict of the Clauses," *see Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995) (striking down, as violative of the Free Exercise Clause, a U.S. Army regulation that extended benefits to private day care centers but discriminated against faith-based centers freely chosen by parents; the government's discrimination against religion was found not required by the Establishment Clause).

387. Liberalism is prone to suppose that the "tension" between the Free Exercise and Establishment Clauses is intrinsic to the text and thus irreconcilable. *See, e.g., Sherry, supra* note 42, at 123-25, 129-30 (discussing how a broad interpretation of either Clause directly conflicts with a broad interpretation of the other). But there is no "conflict" between the Religion Clauses when the Establishment Clause is viewed as structural. *See also supra* notes 361-63, 365-68; *infra* notes 414-17 and accompanying text. Thus, a structuralist view solves yet another doctrinal puzzle.

mand of neutrality and the command of no-aid. Looking only at the results in its cases, the Court has consistently permitted states to administer neutral programs of direct aid for institutions of higher education, including assistance to those colleges that are church-affiliated.<sup>388</sup> Additionally, although the cases are few, the Court has rebuffed challenges to neutral programs of direct aid to health care<sup>389</sup> and social services.<sup>390</sup> The results in these cases would not change under a structuralist perspective, provided that any regulatory oversight that came with the governmental funding did not undermine the religious integrity of the faith-based provider.<sup>391</sup>

Concerning programs of direct aid to primary and secondary education, the Court's case law is far more complex and uneven. Unlike colleges and social welfare agencies, faith-based primary and secondary schools are regarded as "pervasively sectarian" by the Court.<sup>392</sup> Where the program of

388. *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (plurality opinion) (upholding a state's noncategorical grant program for colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (sustaining issuance of revenue bonds for colleges); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding state construction grants for college buildings).

389. *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding a federal grant for building construction at church-affiliated hospital).

390. *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding, on its face, a federal program funding church-affiliated counseling centers for teenagers).

391. For a survey of the ways in which regulatory requirements imposed on recipients of governmental aid can compromise the autonomy of religious organizations, see ESBECK, *supra* note 310, at 11-39; STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 109-46 (1996).

392. The meaning of the term "pervasively sectarian" can be gleaned from the cases. In *Roemer*, 426 U.S. at 758, the Court turned back a challenge to a state program awarding non-categorical grants to colleges, including sectarian institutions that offered more than just seminarian degrees. In its discussion focused on the fostering of religion, the Court said:

[T]he primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. *Hunt v. McNair*, 413 U.S. 734 (1973)] requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded.

426 U.S. at 755. The Roman Catholic colleges in *Roemer* were held not to be pervasively sectarian. The record supported findings that the institutions employed chaplains who held worship services on campus, taught mandatory religious classes, and started some classes with prayer. However, there was a high degree of autonomy from the Roman Catholic Church, the faculty was not hired on a religious basis, faculty had complete academic freedom except in religious classes, and students were chosen without regard to their religion.

A comparison of the colleges in *Roemer* with the elementary and secondary schools in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 767-68 (1973), somewhat clarifies the term "pervasively sectarian." The schools in *Nyquist*, found to be pervasively sectarian, placed religious restrictions on student admissions and faculty appointments, they enforced obedience to religious dogma, they required attendance at religious services, they required religious or doctrinal study, the schools were an integral part of the mission of the sponsoring church, they had religious indoctrination as a primary purpose, and they imposed religious restrictions on how and what the faculty could teach.

Although the definition of a "pervasively sectarian" institution has been stated in general terms, never has the Court found a faith-based institution attending to the needs of social welfare, health care, or of higher education to be pervasively sectarian. Only church-

aid was targeted at private schools alone, including private religious schools, the legislation was nonneutral and the Court struck it down as violative of the Establishment Clause.<sup>393</sup> Where the program was directed toward helping all primary and secondary schools, public and private, religious and nonreligious, the program satisfied the neutrality requirement.<sup>394</sup>

Whether satisfying the neutrality requirement, without more, is sufficient to comply with the Establishment Clause is the question upon which the Court remains sharply divided.<sup>395</sup> In *Agostini v. Felton*,<sup>396</sup> the Court recently upheld a federal program employing teachers to travel to primary and secondary schools and provide on-site remedial educational assistance to low-income, at-risk students.<sup>397</sup> The neutrality of this large federal program was a major factor in upholding its constitutionality.<sup>398</sup> Thus, in its most recent pronouncement on the question, the Court upheld a direct-aid program that delivers remedial educational services to K-12 school cam-

affiliated primary and secondary schools have ever been found by the Supreme Court to fit the profile.

393. *New York v. Cathedral Academy*, 434 U.S. 125 (1977); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Sloan v. Lemon*, 413 U.S. 825, 828-33 (1973); *Nyquist* 413 U.S. at 782 n.38; *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808 (1972).

394. The Supreme Court has upheld neutral programs of direct aid. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (upholding a form of direct financial aid that was available on neutral basis to religious and nonreligious organizations); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding neutral program of aid to students attending institutions of higher education).

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153 (1996), directs the Federal Communications Commission to implement a universal service program to make computer internet and other network services available in libraries and K-12 schools, including religious schools. 47 U.S.C. § 157; 47 C.F.R. §§ 54.5 to 54.516, 69.619. The Act follows the neutrality principle. Schools must apply to the FCC for a discount. Successful applicants purchase commercially available network services from private-sector vendors. A portion of the vendor's bill to the school is discounted. The vendor is reimbursed the difference by the administrator of a fund raised by a telecommunication tax.

395. Compare *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (upholding direct aid to an education program because, inter alia, it was neutral), with *id.* at 2025 (Souter, J., dissenting) (stating that neutrality "is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny"). Compare *Rosenberger*, 515 U.S. at 839 (noting neutrality is significant factor in upholding programs), with *id.* at 852 (O'Connor, J., concurring) (stating that the "Court's decision . . . neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence").

396. 521 U.S. 203 (1997).

397. *Id.* at 207, 218-36.

398. *Id.* at 224-26. *Lemon*, decided in 1971, was the first case in which the Court found unconstitutional aid to K-12 schools. The most recent cases by the Court to strike down aid to K-12 schools came in 1985. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (striking down K-12 aid); *Aguilar v. Felton*, 473 U.S. 402 (1985) (same). But *Ball* and *Aguilar* were overruled in *Agostini*. Thus, the last Supreme Court case to strike down K-12 aid that is still good law is *Cathedral Academy*, 434 U.S. 803 (1977). That means the pervasively sectarian test carried the day for a mere six years, 1971-1977. This is a further indication that the pervasively sectarian test has been replaced by the neutrality principle.

puses, whether public or private, religious or nonreligious.<sup>399</sup>

A structuralist view would permit neutral programs of direct aid for all service providers, including faith-based providers. As discussed previously, the two-fold purpose of this structure is to prevent harm to the *civitas* and to the *religare/ekklesia*, harms that are non-Hohfeldian in nature.<sup>400</sup> Neutrality in the design of a direct-aid program is sufficient to meet the first of these feared harms, namely government-induced religious factions within the *civitas*. The no-aid view of separationism argues that political divisiveness along denominational or creedal lines will result unless all aid is denied to religious providers. Typically the point is buttressed by reference to European religious wars, which were known to the founding generation, as well as by warnings that point to modern-day Northern Ireland, Bosnia, or India. These are indeed events and internecine conflicts worthy of avoidance, and the fear of sectarian factions within the *civitas* has received frequent mention in the Court's opinions.<sup>401</sup> But no-aid separationists overlook an obvious distinction between these instances of denominational factionalism and their no-aid solution. The religious wars of medieval Europe were wars for religious monopoly—each side sought to defeat the other in

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399. See also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that the government's provision of sign language interpreter to student enrolled in Roman Catholic high school did not violate the Establishment Clause).

400. See *supra* notes 45-48, 252-60 and accompanying text. *Engel v. Vitale*, 370 U.S. 421, 431-33 (1962), has the most extended Supreme Court passage on the twin purposes of the Establishment Clause. Further, there is an oft-quoted passage on the avoidance of sectarian strife within the body politic in *McGowan v. Maryland*, 366 U.S. 420, 430 (1961) ("[T]he establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.").

401. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring) ("The mixing of government and religion can be a threat to free government, even if no one is forced to participate."); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 n.10 (1982) ("At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control.") (quoting B. BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 98-99 n.3 (1967)); *McDaniel v. Paty*, 435 U.S. 618, 642 (1978) (Brennan, J., concurring) ("Our decisions under the Establishment Clause . . . naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society."); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 796 (1973) ("[C]ompetition among religious sects for political and religious supremacy has occasioned considerable civil strife."); *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) ("What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 219 (1963) ("[T]he Constitution . . . prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.") (quoting from an earlier concurring opinion by Frankfurter, J.); *Engel v. Vitale*, 370 U.S. 421, 425-27 (1962) (discussing English struggles over the contents of The Book of Common Prayer); *McGowan v. Maryland*, 366 U.S. 420, 430 (1961) ("[T]he Establishment of religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.").



order to impose its own religious hegemony.<sup>402</sup> Neutrality in the design of financial aid programs has no such goal. Indeed, the goal is just the opposite. If a program of aid is truly neutral, then each individual's religious choices are maximized while the government's influence over those choices is minimized. Religious choice is not held up as the ultimate constitutional value in itself; rather, the value is in each person being free to pursue the dictates of his or her own worldview. The result is cultural pluralism, the opposite of religious hegemony. As citizens take control of those life choices that implicate deeply held beliefs, neutrality in programs of aid leads to a reduction in factionalism along denominational or creedal lines, and the unity of the *civitas* is enhanced.<sup>403</sup>

It is not political division in the body politic that a structuralist view was designed to avoid. Nor is it division over moral questions. Such political and moral divisions are inevitable, and vigorous debate—including debate over religion as such, and its moral and political implications—is protected by the Free Speech Clause.<sup>404</sup> To wield the Establishment Clause as a censor's pen suppressing any such outbreaks in debate, as no-aid separationists do, puts the Free Speech Clause in conflict with the Establishment Clause. Rather, it is the government's *official* actions causing factional strife along denominational lines that are subject to examination for having caused Establishment Clause harm, not the resulting *private* actions of citizens reflecting such divisions or debate.<sup>405</sup>

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402. Laycock, *supra* note 45, at 1089-94; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992) (stating that for the Founders, "the great threat to religious pluralism [was] a triumphalist majority religion"). Historically, preventing religious faction was relevant when Europe had the war of the one against the all, that is, when a single church with the assistance of the state sought a religious monopoly. Religious monopoly is not the aim of structuralism. Indeed, it is no-aid separationism that is exacerbating (not preventing) a culture war along religious lines. See *supra* note 123; *infra* note 417. Contrariwise, a structuralist view elevates religious choice and thus has the effect of reducing religious conflict in which government has a role.

403. Fowler, *supra* note 312, at 182-83 (giving a postmodernist argument for neutrality in governmental aid to schools as the more sure path to tolerance, civic peace, and social stability).

404. See *supra* Part VI.D.; *infra* note 440. The Free Speech Clause protects private actions as citizens make their opinions known in the public square. Justice O'Connor made this helpful distinction when she rejected "political divisiveness" as an element of "excessive entanglement," which in turn was one factor in the three-prong *Lemon* test:

Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself.

*Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring); see also Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 683-85 (1980) (rejecting political divisiveness as a value to be judicially enforced by the Establishment Clause).

405. The Establishment Clause does not restrain private actions of citizens, only government actions. See *supra* note 44 and accompanying text. This is why the Supreme Court has

The harm to the body politic, or *civitas*, addressed by a structuralist perspective is that which results when a government fails to act with a secular purpose.<sup>406</sup> When the government acts, it may not have as its object the awarding (or burdening) of an inherently religious belief or practice, nor may it have as its object the awarding (or burdening) of a religious group. "If politics cannot explicitly favor [in its governmental outputs] one sect over another, the incentives to organize politically along explicit religious lines are diminished."<sup>407</sup>

There will always be religious factions, of course, within any open society. This is not the concern of the Establishment Clause. The aim of the Clause is for *government* to avoid inducing new religious factions or heightening old ones. True, there are situations where no matter what decision the government makes, old wounds will be inflamed. In such cases, the path of neutrality promises the least factionalism within the body politic. With neutrality, the government is least involved in influencing the religious choices of its citizens.

This fracturing of the *civitas* is a polity-wide harm, a generalized grievance as opposed to an individualized injury. To such a harm the Establishment Clause gives a non-Hohfeldian remedy.<sup>408</sup> That remedy limits gov-

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rightly rejected "political divisiveness" as a separate element of its entanglement prong in the three-prong *Lemon* test. See *Bowen v. Kendrick*, 487 U.S. 589, 617 n.14 (1988) (rejecting political divisiveness, without more, as a basis for invalidating a government's direct aid program).

406. Professor Ira C. Lupu, by distinguishing between what he calls "political inputs" by citizens and "political outputs" by government, is very close to striking the right balance between protecting the Free Speech Clause right of religious individuals to be politically active and the no-establishment concern with harm to the body politic:

The secular purpose requirement does not exclude religious actors from politics, nor does it limit the arguments they may make in their political efforts. The Establishment Clause does not extinguish the political liberty of religious entities to contend for policies or programs they find most congenial. So long as these arguments must ultimately be connected by the state to their corresponding secular justifications, however, [religious] entities will be encouraged to create political alliances outside narrow sectarian boundaries. The [Establishment] Clause thus should be construed to constrain political outputs (rather than inputs) to those policies that can be justified in secular terms.

Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 368 (1996) (footnotes omitted).

407. *Id.* at 364 (footnote omitted).

408. By denying governmental jurisdiction over inherently religious matters, a structuralist Establishment Clause has the effect of protecting religious liberty writ large. Thus, the no-establishment principle is not an individual right from governmental intrusion but a freedom redounding in favor of the entire body politic to a government that may not meddle in inherently religious matters. This fundamental difference between the individual freedom that derives from a constitutional right and the polity-wide liberty that derives from constitutional structure was well stated by Justice Kennedy in the recent line item veto case:

So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary . . . . In recent years, perhaps, we have come to think of liberty as defined by that word

ernment by restraining its use of sovereign power in a way that is discriminatory, that is, in a way that supports or awards creedal or ideological hegemony. Neutrality in the design of government aid programs promises to reduce division within the *civitas* that is the result of governmental bias for one worldview over others. Contrariwise, continued adherence to the no-aid view promises only to increase ideological tyranny within the *civitas*. Citizens know when a worldview alien to their own is being imposed, and they will resist.

Consider the problem of funding elementary education. Young children are impressionable; hence, education is inevitably parent-directed.<sup>409</sup> Moreover, schooling in the early grades necessarily concerns matters of foundational beliefs, that is, education entails the authoritative promulgation of first-order values, not just conveying information. Postmodernism has helped us to an appreciation that even the "information" conveyed in school curricula is never "hard facts and figures" but screened data presented from a cultural perspective. Accordingly, when a society educates its youth, it cannot escape making judgments about the kind of citizens it wants its children to become. Education is inevitably about ultimate truths or perceptions thereof; hence, it essentially involves matters of religious concern. It follows that these are the matters that parents will have strong convictions about and thus deem worth fighting for on behalf of their children. How, then, is a society to deal with the twin facts that education inevitably and deeply implicates ultimate concerns, and that various groups of citizens hold quite different ideas about how to educate their young?

One solution is for the majority to impose, by control of the political apparatus, its vision of education and beliefs of ultimate concern on all others. But this approach politicizes education and fractures the *civitas* along lines of "imposers" versus "resisters" of a creedal hegemony, essentially creating competing systems for perceiving reality. If those not in control of the political machinery are to resist this education for their children, then private schools are available—but at a price not affordable by most parents. A more just resolution, one that avoids politicizing education and fractur-

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in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

Clinton v. City of New York, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring).

409. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents have a substantive due process right to direct the upbringing of their children, including a child's religious training); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same); see also *Farrington v. Tokushige*, 273 U.S. 284 (1927) (same, only school was private nonsectarian).

ing the *civitas* along essentially ideological lines, is to pursue pluralism. By stopping the all-or-nothing battles over who will control the school monopoly, and permitting evenhanded funding of a diversity of schools, governed in various ways, serving up a variety of curricular offerings and ultimate visions of reality, neutrality diffuses the need to quarrel and contend. In the end, then, neutrality in school funding promotes unity within the *civitas*, which is one of the two aims of the Establishment Clause.

No-aid separationism was plausible when government was small, taxes were low, and most education and social welfare was privately funded. It was plausible when America was more homogeneous, more Protestant, and more Northern European in national origin. In the present age of the affirmative state, when government monopolizes most of the available resources for education and social services, private funding as the sole source of aid for independent schools and welfare services is no longer a sustainable alternative.<sup>410</sup> Not only has the no-aid view led to an inequitable division of limited resources, but the lack of evenhandedness has stifled the parental role in choosing and directing the education of children. The same is true with social services, where lack of neutrality in funding hampers the poor and needy from choosing the service provider that will best meet their needs for job training, child care, rehabilitation from drug dependencies, and other social services.<sup>411</sup>

In addition to protecting the *civitas*, the structuralist view is concerned with avoiding harm to *religare/ekklesia*.<sup>412</sup> From the perspective of neutrality, when government provides benefits such as education, health care, or social welfare to promote the public good, there should be no exclusionary criteria requiring faith-based providers to engage in self-censorship, or to otherwise water down their religious identity as a condition of program par-

410. FREDERICK M. GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE 168-89 (1991); Berg, *supra* note 69, at 740; John H. Garvey, *What's Next After Separationism?*, 46 EMORY L. J. 75, 80-81 (1997); Giannella, *supra* note 274, at 554-60; Laycock, *supra* note 45, at 1089-94.

411. In neutrality theory, the activities of "government" do not monopolize the "public." The voluntary sector, including religious groups, also does the "public's" work. At present—as well as historically—faith-based charities comprise a large number of the available voluntary sector social service providers, and they operate many of the most efficient and successful programs. ESBECK, *supra* note 310, at 3-7. So long as the government's welfare program furthers the secular purpose of society's betterment—that is, help for the poor and needy—it is neutral as to religion if the program involves faith-based providers on an equal basis with all others. Lupu, *supra* note 406, at 369, 371-73 (embracing neutrality theory).

Additionally, the voluntary sector providers of social services who opt to participate in a government's welfare program are not in any primary sense "beneficiaries" of the government's assistance. As they deliver services to those in need, faith-based providers add far more in value measured in societal betterment than they ever possibly receive as an incident of their expanded responsibilities under the program of aid.

412. See *supra* notes 252-60 and accompanying text. The *ekklesia* is undermined by, *inter alia*, compromising regulatory "strings" attached to the monies in the government's program of aid. ESBECK, *supra* note 310, at 11-39, 49-51; MONSMA, *supra* note 391, at 109-46.

ticipation.<sup>413</sup> If neutrality is to succeed, faith-based providers must not be forced to shed or disguise their religious character and suppress their spiritual voice, all to appear "secular enough" to be eligible for the needed funding. Unless the *ekklesia* is protected along with the *civitas*, the goal of pluralism will be frustrated, and the state-sanctioned dominance of a single worldview will continue.

The structuralist view has the added advantage over a strict rule of no-aid in that it eliminates unnecessary "tensions" among the Clauses of the First Amendment. By not discriminating in favor of secular providers over faith-based providers of education, health care, and social services, the Free Exercise Clause is not brought into conflict with the Establishment Clause.<sup>414</sup> The structuralist perspective would also do away with the Supreme Court's cases denying direct aid to "pervasively sectarian" providers while allowing aid to nonpervasively sectarian organizations.<sup>415</sup> In singling out "pervasively sectarian" organizations,<sup>416</sup> the Court has set up an aid/no-aid test that violates two of the Court's other principles of law, namely, its rule against government favoring one religious organization over another, and its rule against delving into the nature of religious doctrine and practices.<sup>417</sup> By abandoning the "pervasively sectarian" category and allowing

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413. Self-censorship as a condition on the receipt of a governmental benefit is not only contrary to structuralism but may also violate freedom of speech and association. See *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996). In *Hsu*, a student religious club claimed the right to meet on the campus of a public high school on the same basis as other noncurricular student organizations. The religious club had a right of access to the school facilities under federal statutory law and the Free Speech Clause. However, when it came to its election of leaders, the school prohibited the club from selecting only Christians. The club then brought suit. The appeals court held that the club indeed had a right to be relieved of the school's nondiscrimination regulation when filling offices requiring spiritual functions. Election of leaders sharing the same faith was essential to the club's character or self-definition, as well as the maintenance of its associational character and continued expression as a Christian club. *Id.* at 856-62. Logically, the same result would be reached under a structuralist view, for the Establishment Clause denies to government any power over the selection of spiritual leaders. See *supra* note 174.

414. To design a program of aid that intentionally excludes religion is a *prima facie* violation of the Free Exercise Clause. See *infra* note 435; see also *supra* note 40 (discussing *Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995)). Because the program of aid at issue in *Hartman* was neutral, under structuralism the Establishment Clause would permit the aid to parents desiring faith-based child care. Accordingly, there would be no "tension" between no-establishment and the parents' right to be free of religious discrimination under the Free Exercise Clause.

415. See *supra* note 392 and accompanying text.

416. The category "pervasively sectarian" first surfaced in *Lemon v. Kurtzman*, 403 U.S. 602, 615-19 (1971); see also *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (stating that religiosity in parochial elementary and secondary schools does not ordinarily permeate the education provided to college students).

417. See *supra* notes 230-34 and accompanying text.

The sectarian division is no longer along the old alignments of Protestant versus Catholic versus Jew. The realignment is now orthodox (Protestant, Catholic, and Jew) versus progressive (Protestant, Catholic, and Jew). HUNTER, *supra* note 123, at 42-46. Professor Hunter, a sociologist of religion, has identified the pervasively sectarian groups as "orthodox," and the acculturated as religious "progressives." Hunter explains that the religious orthodox

neutral programs of aid, the Court's case law would no longer be conflicted.

## VII. LOCATING THE BOUNDARY BETWEEN RELIGION AND GOVERNMENT

What remains in question is not so much the existence of a "wall of separation" as it is the question of where civil and religious authorities say the boundary between religion and government lies and what people can do on the ecclesiastical side of the boundary free from governmental interference, as well as free from government's over-involvement. This Part marshals the cases that indicate where the Supreme Court has located that boundary. First, however, the unnecessary confusion concerning the place of the Free Exercise Clause needs to be addressed.

### A. DIFFERENTIATING THE FREE EXERCISE AND ESTABLISHMENT CLAUSES

As a structural restraint, the purpose of the Establishment Clause is not to safeguard individual religious rights. That is the role of the Free Exercise Clause, indeed its singular role. Even in archetypal no-establishment cases as those concerning religion in public schools, such as *Engel v. Vitale*<sup>418</sup> and *McCullum v. Board of Education*,<sup>419</sup> the Court has applied the Establishment Clause not to relieve individual complainants of religious coercion or religious harm,<sup>420</sup> but to keep in proper relationship

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are devoted "to an essential, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." Religious organizations most willing to conform to contemporary culture will appear to the government as less sectarian. Conversely, those organizations more conservative in theology and that have resisted acculturation will inevitably appear to civil courts as more sectarian. To exclude from public aid those groups that are more sectarian is to punish those religions that resist conformity to culture while favoring those groups willing to secularize. Hence, the "pervasively sectarian" text is facially discriminatory against the religiously orthodox.

418. 370 U.S. 421 (1962). In *Engel*, the Supreme Court considered a state program of daily classroom prayer in the public schools. Students not wanting to participate were excused without penalty. *Id.* at 423 n.2. The program was struck down despite the absence of legal compulsion or religion being imposed. *Id.* at 430-31.

419. 333 U.S. 203 (1948). In *McCullum*, the Supreme Court considered a program that permitted persons from the community to come onto the public school campus and conduct elective classes in religion. Student enrollment was optional and required parental permission. *Id.* at 207 n.2. The program was struck down despite the absence of legal compulsion or religion being imposed. *Id.* at 232-33 (Jackson, J., concurring).

420. Legal historian Mark DeWolfe Howe states the matter this way:

The First Amendment . . . interpreted [through Jefferson and Madison] would serve two purposes . . . . In the second place, it would impose a disability upon the national government to adopt laws with respect to establishments whether or not their consequence would be to infringe individual rights of conscience.

To find this second purpose in the First Amendment involves, necessarily I think, the admission that the Amendment is something more than a charter of individual liberties.

Howe, *supra* note 54, at 51, 55.

two centers of authority: government and religion.<sup>421</sup> This is why in popular discourse it is said that the Establishment Clause is about "church-state relations" or the "separation of church and state." It is in this primary role—when invoked to keep the spheres of government and religion in the right relationship to each other—that the Establishment Clause broke free from older European patterns and made its most unique and celebrated contribution to the American constitutional settlement.<sup>422</sup>

The Establishment Clause can be a means of redress for personal harms, but only when the injury is other than religious in nature, such as economic harm or damage to property,<sup>423</sup> constraints on academic inquiry

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421. As the Supreme Court put it in *McCullum*, "[T]he First Amendment rests on the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCullum*, 333 U.S. at 212. In reference to the Establishment Clause, the Court in *Engel* said that its "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel*, 370 U.S. at 431.

Some will be dismayed at the thought that the Establishment Clause does not have the object of protecting individual religious rights. But consider *Lee v. Weisman*, 505 U.S. 577 (1992), and *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989). In *Weisman*, the Court found violative of the Establishment Clause prayer offered at public school commencement ceremonies. Attendance was voluntary as was participation in the prayer. Complainants claimed neither a violation of their religiously informed conscience nor other religious burden on their own religious belief or practice. In *Allegheny*, the Court found a display on public property of a Christmas nativity scene depicting the birth of Jesus Christ violative of the Establishment Clause. Viewing the display was, of course, a voluntary act. Once again the complainants claimed no coercion of conscience or other individual burden on their own religious practices as a result of the display. Professor McConnell criticized the Court for these decisions because "they have nothing to do with freedom of religion. There is not a single person in these cases who has been hindered or discouraged by government action from following a religious practice or way of life." Michael McConnell, *Freedom From Religion?*, AM. ENTERPRISE, Jan.-Feb. 1993, at 34, 36. Professor McConnell is surely correct in observing that no one in *Weisman* or *Allegheny* had his or her personal religious rights violated. But McConnell wrongly assumes that a violation of an individual's religious freedom is requisite to a violation of the Establishment Clause. The Clause, as applied by the Supreme Court, is about something altogether different: limiting governmental power so as to keep in appropriate relationship religion and government. Thus, to understand *Weisman* and *Allegheny*, the cases must be viewed as structural determinations by the Court that government exceeded its power by involving itself in a matter beyond its authority.

422. Historian Stanford Cobb has observed that America's solution to the "world-old problem of Church and State" was "so unique, so far-reaching, and so markedly diverse from European principles as to constitute the most striking contribution of America to the science of government." STANFORD COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* at vii (1902). Republican government, being self-government of the masses, requires a virtuous and self-disciplined people. Because survival of the state depends on civic virtue, government may assume a role in promoting that virtue. However, notwithstanding that religion plays a vital role in informing the people in virtuous living, the American constitutional settlement was to deny to the national government a role in promoting religion. Genuine religion was not to be a tool of statecraft. Rather, religion was left to individual choice and voluntary faith. Only in this manner, the American solution had it, could religion remain uncorrupted as well as the government undivided by sectarian ambitions to wield civil power. McConnell, *supra* note 77, at 1442.

423. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (upholding claim of de-

by teachers and students,<sup>424</sup> or restraints on free-thinking atheists.<sup>425</sup> Even in these situations, however, the no-establishment principle is not transformed into an individual rights clause with the assigned task of protecting, respectively, property, academic freedom, and freedom from religion. Rather, these injuries are remedied only consequentially to the Establishment Clause as it fulfills its structuralist role.<sup>426</sup>

From time to time religious claimants have sought to enlist the Establishment Clause into serving as a rights clause, but the Supreme Court has only once followed that course. In *Larson v. Valente*,<sup>427</sup> the Court applied the no-establishment principle to entertain a claim involving discrimination among religious groups and thus redressed allegations of religious harm.<sup>428</sup>

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partment store against labor law); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (upholding claim of tavern seeking issuance of a liquor license); cf. *Two Guys from Harrison Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (permitting claim of economic harm by retail stores to be free of Sunday closing law, but ultimately ruling against the stores on the merits); *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961) (same).

424. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a state law that required teaching of creation in public school science classes if evolution is taught); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes).

425. See *Torcaso v. Watkins*, 367 U.S. 488 (1961). In *Torcaso*, an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement violative of the First Amendment without specifying either Religion Clause. If an individual objects to the oath out of a religious belief that forbids taking oaths, then he has a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in *Torcaso* did not (indeed, by definition could not) suffer a religious injury as he professed to have no religious beliefs. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in a deity is a subject that remains in the realm of religion.

Atheists and agnostics are sensibly protected as well by the Free Speech Clause, for the rights implicated are freedom to believe and freedom to refrain from speaking. *HOWE, supra* note 77, at 156-57. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court found violative of free speech rights a law permitting censorship of films found to be "sacrilegious." The Court could have reached the same result under the Free Exercise Clause if the film producer sought to convey a religious belief, either about his own faith or a theological criticism of the faith of others. Additionally, the Court could have struck down the censorship law under the Establishment Clause and done so regardless of whether the film producer sought to convey a religious message, for a no-establishment violation does not have as its object the redress of personal religious injury.

426. The structuralist role in the three cases of *Thornton*, *Edwards*, and *Torcaso* is to restrain government from preferring particular religious practices over secular concerns in the spheres of commerce, science, and qualifications for government office. Preferences of this sort, if allowed to multiply without bound, can lead to a convergence of political factions and religious denominations. See *supra* notes 406, 408.

427. 456 U.S. 228 (1982).

428. In *Larson*, state charitable solicitation legislation distinguished between religious groups that received over half their revenues from their membership and those that did not. The law thereby favored long-founded churches over new religious movements. The Court held that for government to intentionally discriminate on the basis of religious affiliation is a violation of the Establishment Clause. *Id.* at 244-56. The Court assumed the complainant was a church subscribing to a bona fide religion. *Id.* at 244 n.16.



But this was highly unusual<sup>429</sup> and probably wrongheaded, for *Larson* could just as easily—and more sensibly—have been grounded in the Free Exercise Clause.<sup>430</sup> To illustrate, if Congress in 1789 had not submitted to the states an Establishment Clause for enumeration in the Bill of Rights, a *Larson*-type claimant still could have secured relief from religious persecution by filing suit under the Free Exercise Clause. But numerous other claimants, such as the department store in *Estate of Thornton v. Caldor, Inc.*,<sup>431</sup> the tavern in *Larkin v. Grendel's Den, Inc.*,<sup>432</sup> and the public school teacher desirous of expanding the science curriculum in *Epperson v. Arkansas*,<sup>433</sup> could not have plead successfully a free exercise claim because they suffered no religious harm. Absent an Establishment Clause, these three claimants would have been unable to state a claim upon which relief could be granted.

The literature is often uneven when using the terms “religious freedom,” “religious liberty,” and “religious rights.”<sup>434</sup> This Article equates all

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429. The only other Supreme Court case willing to entertain the Establishment Clause as a source of redress for personal religious injury is *Gillette v. United States*, 401 U.S. 437 (1971). In *Gillette*, the Court held that exemptions from the military draft for those religiously opposed to all war but not for those willing to fight in a “just war” were not intentionally discriminatory on the basis of religious affiliation and thus did not violate the Establishment Clause. *Id.* at 450-54. Hence, *Gillette* acknowledged no-establishment as a potential source of redress for religious harm caused by religious discrimination but then went on to hold that this particular claim was without merit. *Larson* is thus the only Supreme Court case where personal religious injury actually found redress pursuant to the Establishment Clause.

430. It is more sensible to conceptualize a government's intentional discrimination between two religious groups as injurious to the disfavored religion. If that had been done in *Larson*, the Court could have decided the case under the Free Exercise Clause. In order to resolve *Larson* under the Establishment Clause, as the Court did, one has to envision the government's discrimination as unconstitutional not because it hindered the disfavored religion, but because the discrimination effected a preference for competing religions. This framing of the claimants' injury is conceptually awkward. Official discrimination against a religion does have the potential of helping other religions, but then again it may turn out to be of no benefit to the competition. It would be better for the Court to focus on the harm to the victimized religion rather than to speculate about benefits to competing religions. The Court did proceed in the more logical fashion suggested here in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding ordinances that ostensibly regulated the ritual sacrifice of animals but whose real object was to inhibit the practices of a particular church as violative of the Free Exercise Clause).

431. 472 U.S. 703 (1985). In *Thornton*, a department store chain successfully sued to overturn a state law giving employees an unyielding right to be excused from work on an employee's Sabbath.

432. 459 U.S. 116 (1982). In *Larkin*, the owner of a bar was denied a municipal liquor license. The relevant ordinance permitted churches within 500 feet of an applicant to veto the issuance of a license. Alleging pecuniary harm as a result of the denial, the owner successfully overturned the ordinance as an unconstitutional delegation of sovereign power to a religious organization. *Id.* at 122-27.

433. 393 U.S. 97 (1968). In *Epperson*, a high school biology teacher successfully sued to overturn a state law that prohibited the teaching of Darwin's theory of evolution in the public schools.

434. There are no Free Exercise Clause rights for a religious group over and above the aggregated individual rights of the entity's membership. However, the Establishment Clause in

three, and the terms are used in the sense of an individual right that protects against personal religious burdens or harms. Such a right is secured by the Free Exercise Clause.<sup>435</sup> Moreover, the redressing of personal harm to an individual's religious belief or practice is the Free Exercise Clause's only function.<sup>436</sup> This makes sense because the Clause is, by its terms, about prohibiting the free exercise of religion rather than unbelief.<sup>437</sup> The Free Exer-

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its role as a limit on governmental power does afford religious groups institutional autonomy when acting on matters reserved to the sphere of religion. *See supra* Part IV.C.2. (discussing church autonomy).

Some may be dismayed that the Free Exercise Clause does not protect religious organizations (beyond the aggregated rights of their members) in preserving the group's autonomy and religious character in the face of governmental intrusion. But, again, as seen *supra* Part IV.C.2., religious organizations have such safeguards, but they are secured by the Establishment Clause rather than the Free Exercise Clause. The well-meaning project to force such safeguards into the scope of the Free Exercise Clause under the banner of "accommodationism" has caused all manner of doctrinal confusion.

435. The Free Exercise Clause is violated when government enforces a restriction that intentionally discriminates against religion, religious practice, or against an individual because of his or her religion. *Lukumi*, 508 U.S. at 520. However, a law's unintended discriminatory effect adverse to a religious belief or practice is not, without more, a free exercise violation. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

A persistent minority of the Justices on the Supreme Court indicate that they would go further and recognize Free Exercise Clause protection for disparate effects on religion. Compare *City of Boerne v. Flores*, 117 S. Ct. 2157, 2176-85 (1997) (O'Connor, J., dissenting) (arguing that *Smith* should be reconsidered), with *id.* at 2172-76 (Scalia, J., concurring) (defending *Smith* decision); see also *Lukumi*, 508 U.S. at 570-71 (Souter, J., concurring) (arguing that *Smith* should be reconsidered). Whatever the proper scope of the Free Exercise Clause, the injury it redresses is in the nature of personal religious harm and nothing more. However, some critics of *Smith*, seemingly reeling from their loss, are forgetting that a structuralist Establishment Clause also affords considerable autonomy to religion and religious organizations.

436. *Harris v. McRae*, 448 U.S. 297, 320 (1980) (denying standing to bring free exercise claim in absence of alleged religious compulsion); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (rejecting free exercise claim because there was no evidence of impact on claimants' religious belief or practice); *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (holding free exercise claim without merit in absence of religious burden); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 221, 223 (1963) (holding that in a free exercise claim it is necessary to show governmental coercion on the practice of religion); *id.* at 224 n.9 ("[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (stating that the Establishment Clause goes much further than to relieve coercive pressure on religious belief and practice); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) (denying standing to plead free exercise claim when alleged damages were economic rather than religious).

Some may object because this reading of the Religion Clauses leaves too little work for the Free Exercise Clause. I have two responses. First, the work of prohibiting intentional discrimination on the basis of religion is important work indeed. Second, if the reader believes stopping intentional discrimination is still too little scope for this venerable Clause, then that is not my doing but the doing of the Supreme Court in its controversial *Smith* decision. *See supra* notes 31, 435.

437. See John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996) (addressing the contention that the Free Exercise Clause protects unbelief as well as religious belief: "This conclusion is hard to square with the language of the first amendment, which protects only the free exercise 'of religion.' Rejecting religion is an

cise Clause says nothing about other injuries such as protecting against encumbrances on the use of one's property (*Thornton*) or removing hindrances to academic inquiry (*Epperson*). Nor does the Free Exercise Clause prohibit the forced taking of oaths by free-thinking atheists (*Torcaso*).<sup>438</sup> The latter is true because to suffer a personal religious harm an individual must first profess a religion. It follows that the Free Exercise Clause is not an all-purpose conscience Clause.<sup>439</sup> It protects religiously informed belief and practice, nothing more. People can incur injuries other than religious harms, as in economic harm, loss of academic freedom, or compulsion to profess a religious belief when they are agnostic or atheistic. These are individual harms, to be sure, but not religious harms.<sup>440</sup> They are left to be

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exercise of freedom, but it is not an exercise of religion. (Amputation is not a way of exercising my foot.)" *Id.* at 276. It might be argued that liberty in religious matters cannot end with freedom to embrace and practice one's faith, for liberty also includes freedom to reject and refuse to practice the faith of others. And that would indeed be so if the Clause read, "Congress shall make no law . . . prohibiting religious freedom." But that is not the text. Rather, the text reaches out to individuals who have a religion, assuring their *exercise* thereof. Professor Garvey is right: an individual must first have a faith to exercise before its exercise can be unconstitutionally prohibited. I personally would prefer a broader text, but must work with the text as given. And that more narrow Free Exercise Clause explains why the Supreme Court decides cases devoid of religious harm, such as *McCollum*, *McGowan*, *Engel*, *Schempp*, and *Thornton*, under the Establishment Clause.

438. See *supra* note 425 (discussing *Torcaso*).

439. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause; secular views will not suffice); *Thomas v. Review Bd.*, 450 U.S. 707, 713-14 (1981) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (identifying claims that are "personal and philosophical" and those "merely a matter of personal preference" as "not ris[ing] to the demands of the Religion Clauses"); cf. *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion) (holding that conscientious objector status, as conferred by federal legislation, did not require those claiming draft deferment to hold beliefs based on traditional religious views). *Welsh* does not undermine the point decided in *Frazee*, *Thomas*, and *Yoder*. First, *Welsh* involved the definition of religion for purposes of legislation rather than for the First Amendment. Second, because there was no majority opinion, *Welsh* is binding only on the narrow issue decided. Third, the plurality in *Welsh* was, *sub silentio*, rejected by majorities in *Frazee*, *Thomas*, and *Yoder*.

440. When the religious harm is to speech of religious content or to associations formed by religious individuals, it has long been the practice of the Court to protect the free exercise of religion under the Free Speech and Free Press Clauses. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down restrictions on student religious groups wanting to meet in state university buildings designated as limited public fora as violating the Free Speech Clause); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that compulsory flag salute at public school denies freedom of speech and freedom of belief as applied to Jehovah's Witnesses); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (overturning ordinance prohibiting distribution of literature of any kind as abridging the right of Jehovah's Witnesses to freedom of the press). By subsuming where possible protection from religious harm under the Free Speech and Free Press Clauses, the Court has given religious rights a broader and hence more secure base. The constitutional protection for speech and press from content-based and viewpoint-based discrimination by governmental officials is well settled in the courts and widely accepted at the popular level.

The Free Speech and Free Press Clauses are unable, of course, to protect religious activity that has no appreciable expressional content. Concerning such activity, the Free Exer-

remedied, if at all, as a by-product of the Establishment Clause's ordering of the respective competencies of government and religion.

In the hands of the Supreme Court, then, the task of the Establishment Clause is independent of the Free Exercise Clause. Neither Clause is subordinate or instrumental to the other.<sup>441</sup> This is not to say that the Establishment Clause has nothing to do with religious liberty writ large.<sup>442</sup> By delimiting and qualifying governmental sovereignty, structure often rounds to further secure individual rights. Conversely, although rights clauses have as their immediate purpose the protection of individual freedom,<sup>443</sup> they have a consequential impact on governmental power. But this happy symmetry between structure and rights is no reason to conflate the two.<sup>444</sup> The object of a structural clause is to set compensating checks on the

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cise Clause alone must be looked to as the source of constitutional protection from personal religious injury. Justice White, dissenting in *Welsh*, 398 U.S. at 333, stated the matter well:

It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech.

*Id.* at 372.

441. Grammatically there is but one First Amendment Clause (with two prepositional phrases) that explicitly concerns religion. The existence of a single Clause has been turned into an argument that one Religion Clause has but one meaning, and that meaning is the protection of individual religious freedom. Thus, it is argued, the no-establishment phrase is but a means to serve the free exercise phrase. The consequence, should the argument prevail, is that no-establishment becomes a tool in aid of free exercise. See Neuhaus, *supra* note 44, at 1; Richard John Neuhaus, *The Most New Thing in the Novus Ordo Seclorum*, 85 FIRST THINGS 75-78 (1998) [hereinafter *The Most New Thing*].

That the principle of no-establishment does not operate separate and independent of free exercise is not just misguided, but—as implied in the text—has profound consequences. The argument's adoption would lead not just to conflation of an individual right with a structural restraint, but to destruction of the structuralist meaning of no-establishment. Notwithstanding this small grammatical correction, the single Religion Clause consists of two prepositional phrases. Historically each prepositional phrase carried its own operative meaning, for both the Senate and House in the First Congress debated and amended the text of the first Clause of the First Amendment as having two phrases each with its own purpose. The current style is to refer to two Religion Clauses and that practice is followed in this Article. But to discarded that style and substitute the "Establishment Phrase" and the "Free Exercise Phrase" still leaves us with two legal principles of independent reach, neither dependent on the other.

442. This Article distinguishes between, on the one hand, religious rights personal to individuals and groups of individuals, *see supra* note 3, and, on the other hand, religious liberty writ large, *see supra* notes 406, 408. The latter is a liberty that is best described as class-wide, collective, or in the interest of the larger civil society. The Establishment Clause has the object of protecting not individuals *qua* individuals, but two large bodies in civil society: the body politic (the *civitas*), on the one hand, and religion and religious organizations (the *religare/ekklesia*), on the other. The nature of the injury to these respective spheres of competence are explored *supra* in notes 45-48, 252-60, 400-13 and accompanying text.

443. The Free Exercise Clause, as well as the four expressional Clauses in the First Amendment (speech, press, petition, and assembly), are all of this ilk. Their object is to protect individual rights. They work only indirectly to limit the power of the sovereign state.

444. Cf. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). Professor Amar argues that constitutional rights also impose an organizational structure on

powers of a modern nation-state, checks that must be honored whether or not individual complainants suffer concrete "injury in fact."<sup>445</sup> Because the Establishment Clause is a structural clause rather than a rights clause, it is vital that it be understood as such and be so applied.<sup>446</sup>

### *B. A MATTER OF BOUNDARY KEEPING*

Proper relations between religion and government (or "church and state") are codified in the words "make no law respecting an establishment of religion." A structuralist view casts this Clause in the role of boundary keeper. In setting out to locate that boundary, it is a useful reminder that the "keeper's" task is to restrain government, not private individuals, not churches, and not religion.<sup>447</sup>

Identification of the precise topics that fall within the meaning of the words "make no law respecting an establishment of religion"—hence subject matter placed beyond the reach of governmental authority—necessarily entails substantive choices. That boundary has been disputed for over two thousand years,<sup>448</sup> so it would be naive to suppose that there is an easy for-

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government. *Id.* at 1132-33. I agree. The point in this Article, however, is that the structuring of government that comes from the enforcement of a rights clause is not the immediate object of the clause but derivative of it. Conversely, the protection of individual rights that comes from the enforcement of a structural clause is not the immediate object of the clause but derivative of it. Hence, the immediate object of enforcement of the Establishment Clause is not religious freedom, but religious freedom is derivative of it.

445. This is why federal taxpayers, unable to show any personal "injury in fact," have to be granted special standing to pursue Establishment Clause claims challenging spending programs. *See supra* text accompanying notes 134-38.

446. There are going to be a few occurrences where a single harm can properly give rise to a claim under the Free Exercise Clause and the Establishment Clause. To illustrate, assume a public school adopted a regulation requiring that the Lord's Prayer be recited by students at the beginning of each classroom day. A third-grade Muslim student is compelled to recite the prayer. As a Muslim, the student has suffered a religious harm for which the Free Exercise Clause gives individuated relief. The student could also claim under the Establishment Clause, leading to both individuated relief and an injunction against school-wide enforcement of the prayer regulation.

447. The Establishment Clause, indeed the entire Bill of Rights, is a check on government alone. Hence, the Establishment Clause can only be transgressed by government. *See supra* note 44. It does not protect people from other people. It does not protect minority religions from majority religions. It does not protect the nonreligious from the religious. Secular modernists are prone to assume that religious ideologies are more intolerant and violent than secular ideologies; thus they assume that the Establishment Clause is there to protect them from the excesses of religion. But it can protect them from only the excesses of government. Secularists have a blind spot. They believe sectarian conflicts are usually violent. But in the twentieth century, secular ideologies have proven every bit as violent as the sectarianisms of the Middle Ages. Laycock, *supra* note 45, at 1048, 1089-95, 1102.

448. Professor Duesenberg has observed:

Civil church law is in essence a study of the relationship between competing powers . . . . The word competition is chosen to denote the active interplay between church government and civil government which flows from the indecision existing within and between them as to the proper scope of their respective domains. There is not, now nor has there ever been, in the two

mula for determining “what is Caesar’s and what is God’s.” From the perspective of an elder statesman after a full life of public service, James Madison said, “I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collision & doubts on unessential points.”<sup>449</sup>

On the other hand, the difficulty should not be exaggerated. The differences are often, as Madison said, on “unessential points.” In the vast number of cases, a ready reference to the Western tradition as received on this side of the Atlantic<sup>450</sup> will yield a result on which there is an understanding of what is right. It is the hard cases that get most of the attention, thereby leaving the impression that the overall task of boundary keeping is hopelessly conflicted. Moreover, that factions are forever struggling over the location of the boundary actually confirms the central point—it is presumed that there are two spheres of competency and, hence, a religious sphere in which the state is not sovereign.

The Supreme Court has not left lower courts, legislators, and litigants without guidance on this all-important question. The cases indicate that government does not exceed the restraints of the Establishment Clause unless it is acting on topics that are “inherently religious.” The Supreme Court has found that prayer,<sup>451</sup> devotional Bible reading,<sup>452</sup> veneration of the Ten Commandments,<sup>453</sup> classes in confessional religion,<sup>454</sup> and the bib-

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thousand year history of the Christian church common agreement over where to draw the line.

Duesenberg, *supra* note 218, at 508.

449. Letter from James Madison to Rev. Adams (1832), IX WRITINGS OF JAMES MADISON, *supra* note 67, at 484, 487.

450. It should come as no surprise that a structuralist perspective looks to the historic Western tradition. It could hardly look elsewhere. The Founders (as well as the Constitution they wrote) were immersed in Western thought, and America’s unique arrangement of government-religion separation comes out of an alliance of two threads within that Western tradition. See *supra* note 75 (discussing disestablishment as the common cause of the Enlightenment rationalists and the Protestant pietists). Indeed, the First Amendment’s regard for religious freedom and no-establishment cannot be understood apart from their religious justifications. Carter, *supra* note 259, at 1632-33; Steven Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 154-66 (1991). Secular modernists are surprised (or offended) by this, but common sense would indicate that reference to the Western tradition as received in the American colonies should be expected. Any other path would be a deviation from the intent and context of the Framers. Clifford Goldstein, *The Theology Of A Godless Constitution*, 93 LIBERTY 30-31 (May/June 1998). That there are those outside the Protestant-Western tradition displeased with this location of the church-state boundary is cause for sensitivity and (when prudent) accommodation. But it is not a reason to relocate that boundary under the guise of judicial “updating” of the Establishment Clause. Any shifting of the church-state boundary will just create new grievants, for, again, there is no substantively neutral location for the boundary between church and state.

451. *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

452. *Schempp*, 374 U.S. 203.

453. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

lical story of creation taught as science<sup>455</sup> are all inherently religious. Hence, by virtue of the Establishment Clause, these topics are off limits as objects of legislation or any other purposeful government action. Closely related to these case-by-case designations of what is inherently religious and what is "arguably non-religious"<sup>456</sup> is the rule that the Establishment Clause is not violated when a governmental restriction (or social welfare program) merely reflects a moral judgment, shared by some religions, about conduct thought harmful (or beneficial) to society.<sup>457</sup> Accordingly, overlap between a law's purpose and the mores and ethics of a well-known religion does not, without more, render the law one "respecting an establishment of religion." Sunday closing laws,<sup>458</sup> teenage sexuality counseling,<sup>459</sup> the availability of abortion,<sup>460</sup> and interracial dating and civil marriage<sup>461</sup> are subject matters that the Court has deemed not inherently religious. Hence, so far as the Establishment Clause is concerned, these are appropriate topics for legislation.<sup>462</sup>

454. *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

455. *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

456. As one commentator put it, albeit in the context of discussing a different but related problem, topics of legislation can be described as "arguably religious" for free exercise purposes but "arguably non-religious" for no-establishment purposes. *TRIBE*, *supra* note 25, § 14-6, at 828-33.

457. *Bowen v. Kendrick*, 487 U.S. 589, 604 n.8, 613 (1988) (counseling teenagers concerning sexuality is not inherently religious); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (holding a tax regulation prohibiting racial discrimination in education is not inherently religious); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (having a restriction on funding abortions is not inherently religious); *Gallagher v. Crown Koshher Super Market*, 366 U.S. 617, 624-30 (1961) (holding a Sunday closing law is not inherently religious); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592-98 (1961) (same); *McGowan v. Maryland*, 366 U.S. 420, 431-49 (1961) (same); *Hennington v. Georgia*, 163 U.S. 299, 306-07 (1896) (having a prohibition on the Sunday operation of trains is not inherently religious).

458. *McGinley*, 366 U.S. 582; *McGowan*, 366 U.S. 420.

459. *Bowen*, 487 U.S. 589.

460. *Harris*, 448 U.S. 297.

461. *Bob Jones Univ.*, 461 U.S. at 604 n.30 (concerning interracial dating); *Reynolds v. United States*, 98 U.S. 145, 162-67 (1879) (allowing antipolygamy law to override religious beliefs to the contrary in regulating the civil law of marriage).

462. By way of illustration, Clifford R. Goldstein wrestles with how the boundary-keeping task sorts out moral-based legislation, which is permitted by the Establishment Clause, from legislation on an inherently religious matter, which is not permitted. Consider the following excerpt:

[T]o believe not only that moral absolutes exist, but that we can know what those absolutes are, isn't synonymous with the assumption that government should enforce them . . . . In . . . closed totalitarian societies—believing that they possess absolute truth . . . [they] must oppress the masses into conformity with that truth. In contrast, an open, free society, recognizing the elusiveness of these absolutes (or at least the subjectivity in which they're individually perceived and processed) builds institutions and laws designed to protect different concepts of truth. And in the United States, an expression of these laws occurs in the religion clauses of the First Amendment, which ensure that no religious truth will—politically—dominate the rest.

Yet an open society's stance that any truth, or even The Truth, shouldn't

The Supreme Court has successfully avoided two mistakes when drawing the line between government and religion. First, the Court has not identified churches and other religious institutions (e.g., educational, charitable, and mission organizations) and then assumed that religion is actually confined to those institutions. Churches and their affiliated ministries (*ekklesia*) do not monopolize religion (*religare*). Religiously grounded convictions and obligations show their influence in every area of life, not merely in church affairs. Hence, Establishment Clause violations can occur notwithstanding the complete absence of any involvement by churches, mission societies, religious schools, and the like.<sup>463</sup>

Second, the Court has not set out to separate government from all that could be said to be religious. Rather, the separation is of government from matters inherently religious. A separation of government from all that is religion or religious would result in a secular public square, one hostile to the public face of religion. The Founders intended no such regime.<sup>464</sup>

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oppress opposing "truth" or even untruth doesn't mean that it should act as if there is no truth. Law, implicitly or explicitly, implies morality, which reflects various concepts of "truth." . . .

But can this be done without breaching the wall of separation? That all depends, of course, on how high and impregnable that wall is. A wall that separates church and state is fine; one that separates morality from law isn't. When, in the name of separation, a school protects a child from government-sponsored religious exercises, it's defending the [wall] . . . [O]n the other hand, when, in the name of separation, a school teaches condom use instead of abstinence, it's violating principles of that same moral universe.

Clifford R. Goldstein, *Getting Reality Right*, 92 LIBERTY 30-31 (May/June 1997). In his essay, Goldstein goes on to locate the government-religion boundary such that school-sponsored religious exercises are in the exclusive sphere of religion, whereas a law concerning adolescent condom use is properly a subject of governmental regulation. Accordingly, citizens may exercise their political rights—without violating the Establishment Clause—to urge that the government adopt a law that embodies the morality of sexual abstinence.

463. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (striking down state labor law that guaranteed private sector employees a right not to work on Sabbath); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (disallowing posting of Ten Commandments in public school classrooms for veneration); *Epperson*, 393 U.S. 97 (striking down a state law prohibiting the teaching of evolution in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (disallowing a state program of classroom prayer in public school).

464. Historian Mark A. Noll writes:

[T]he founders' desire for the separation of the institutions of church and state reflected a desire to respect not only religion but also the moral choice of citizens. It was not a provision to remove religion as such from public life. In the context of the times it was more a device for purifying the religious impact on politics than removing it.

. . . .

The authors of the [Constitution] seemed to be saying that religion and politics occupied two different "spheres." This was not secular in the modern sense. As we have seen, there was every expectation that Christian principles would continue to play a large role in strengthening the population and even in providing a moral context for legislation. Yet the Constitution, without ever spelling it out precisely, nonetheless still acknowledges that the functions of government in society have a different role than the functions



There are extreme voices claiming for the Establishment Clause the establishment of a secular regime,<sup>465</sup> one that would thereby force religion into the "private" spaces of home and house of worship.<sup>466</sup> Still others lament that the Court has promulgated a right to "freedom from religion."<sup>467</sup> But the cases will not bear either of these readings.

Various Justices of the Supreme Court, in short statements, have sought to encapsulate a definition of the boundary between government and the "inherently religious." Justice Brennan wrote that the common thread in the Court's analysis of whether legislation transgresses the Establishment Clause restraint "is whether the statutes involve government in the 'essentially religious activities' of religious institutions."<sup>468</sup> Just a few years earlier, Justice Harlan wrote "that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State so significantly and directly in the realm of the sectarian,"<sup>469</sup> then the constitutional restraints are not exceeded. As a final example, Justice Frankfurter set the no-establishment boundary in structuralist terms with these words:

The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehen-

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of religion. Both are important, and important to each other. But they are different.

NOLL, *supra* note 77, at 67-69.

465. See Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 483-89 (1996) (arguing that rationalism is constitutionally preferred over religion); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-214, 222 (1992) (contending that the First Amendment's negative bar against an establishment of religion implies an affirmative establishment of a secular public order); see also Bradley, *supra* note 279, at 1059 (referencing projects born of secular liberalism, such as those of John Rawls, Bruce Ackerman, and Richard Rorty, to "privatize" religion). The multicentury tradition of American politics being rooted in contrasting theological persuasions is so well documented as to make silly revisionists claims that the Establishment Clause rendered religion of persuasive force only in the "privacy" of home and church. See, e.g., JAMES L. GUTH ET AL., *THE BULLY PULPIT: THE POLITICS OF PROTESTANT CLERGY* (1997).

466. Robert Booth Fowler contrasts these extremists with the more numerous and tolerant skeptics:

[Present are] those who are ideological secularists, devoted to promoting secularism as a kind of antireligion for everyone. Such individuals or organizations—for example, the aptly named Freedom from Religion Foundation—are as militant in their convictions and as sure of their truth as religious fundamentalists. But for more skeptical secularists, pragmatic adjustment to reality in one's environment in an atmosphere of tolerance is what makes sense . . . . [P]ragmatism in this situation suggests accepting reality and cooperating with it to a degree. This is the way pluralist politics works in the United States now. It is simply practical to suggest that a live-and-let-live attitude prevail as much as possible.

Fowler, *supra* note 312, at 171.

467. See McConnell, *supra* note 421, at 34, 36.

468. *Lemon v. Kurtzman*, 403 U.S. 602, 658 (1971) (Brennan, J., concurring).

469. *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (internal quotation omitted).

sive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country.<sup>470</sup>

Each of these formulations points to the same basic distinction between subjects that are "inherently religious" and subjects that can be justified as arising from the mores and culture of the body politic. This approach, of course, unapologetically draws from the Western tradition as received in the American colonies, as already conceded and to which I return below.<sup>471</sup>

"Inherently religious," then, means those exclusively religious activities of worship and the propagation or inculcation of the sort of tenets that comprise confessional statements or creeds common to many religions. The term includes, as well, the supernatural claims of churches, mosques, synagogues, temples, and other houses of worship, using those words not to identify buildings, but to describe the confessional community (the *ekklesia*) around which a religion (*religare*) identifies and defines itself, conducts its collective worship, divines and teaches doctrine, and propagates the faith to children and adult converts. A structuralist view places these matters—being in the exclusive sphere of religion—beyond the government's jurisdiction.<sup>472</sup>

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470. *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961) (Frankfurter, J., concurring in the judgment); see also *id.* at 465 (1961) (Frankfurter, J., concurring) ("The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation."); Laycock, *supra* note 75, at 381 (stating that "the Establishment Clause separates from government . . . theology, worship, and ritual, the aspects of religion that relate only to things outside the jurisdiction of government. Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken.").

471. See *supra* note 450; *infra* notes 473, 475-76.

472. An unintended consequence of structuralism is that it can place the historic World religions at a disadvantage in comparison to new religious movements as well as newer acculturated religious systems. For example, in drawing the government-religion boundary, theistic religions familiar to Western civilization (e.g., Christianity, Judaism, Islam) have tenets and sacerdotal practices that naturally "look" inherently religious to the Western mind. Contrariwise, religious movements that adopt aspects of contemporary culture for their own belief systems do not "look" inherently religious. Consequently, government is restrained from promoting the beliefs of traditional religions but not restrained from involvement with the beliefs of newer religions or religions evolving with the culture.

The case of *Malnak v. Yogi*, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979), is illustrative. Five public high schools initiated an elective course entitled Science of Creative Intelligence—Transcendental Meditation. Parents of some students brought suit claiming that the course was teaching religion in violation of the Establishment Clause. School authorities contended the course was not religious but involved meditation and other exercises that explored each student's human potential. The distributor of the course textbook, World Plan Executive Council, also presented evidence supportive of the claim that the course was not religious. Ultimately the trial and appellate courts recognized the content of the course as religious and sustained the plaintiffs' claim. However, this result was reached only with consid-

## VIII. CONCLUSION

None of the foregoing claims that the Supreme Court has resolved all of the problems in defining the boundary between religion and government by relegating the no-establishment restraint to governmental actions on matters inherently religious. There will always be boundary disputes, for the task of determining what is "inherently religious" is not substantively neutral.<sup>473</sup> In the main, the Court's decisions have favored the government-

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erable difficulty as to whether SCI-TM was a religion, *Malnak*, 592 F.2d at 200, 213-14 (Adams, J., concurring), and provided one of those rare instances when a court has deemed a belief system to be religious over the objection of its devotees.

Circuit Judge Arlin Adams raised the concern that practices considered secular in Western culture, such as meditation, do not receive an easy pass under the Establishment Clause whereas practices such as Bible reading and prayer are summarily assumed to be religious and hence tossed out of the schools. *Id.* at 212-13 (claiming that newer belief systems such as SCI-TM would be advantaged over older ones such as Roman Catholicism). The problem again arose when fundamentalist Christians with children in public school sued educational authorities claiming that the curriculum was promoting the religion of secular humanism. *Smith v. Board of Comm'rs*, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). The case created a nationwide stir when the parents were successful in having the trial court enjoin the use of textbooks which taught that moral values were wholly relativistic. However, the conclusion that the texts "established" the philosophy of secular humanism was overturned on appeal.

In addition to Judge Adams' thoughtful opinion in *Malnak*, others have argued that courts must be careful lest the beliefs of acculturated religious systems be unthinkingly promoted by government. See Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 610-12 (1982) (arguing that the First Amendment's more general freedom from government-imposed beliefs concerning truth claims, whether religious or nonreligious, serves to restrain government); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 834-35 (1984) (arguing that nontheistic religious ideologies "could have it both ways" if the Establishment Clause is applicable to practices thought inherently religious by traditional standards); cf. *TRIBE*, *supra* note 2, § 14-6, at 1187 (opining that prayer is religiously significant to most people but preservation of eagle feathers is not; hence, government may promote the latter but not the former).

It is true that in one sense traditional Western notions of religion are at a disadvantage in instances such as *Malnak* and *Smith*. There is, however, a compensating protection for traditional religions; namely, by virtue of a structuralist view government has no jurisdiction over traditional Western notions of those matters which are inherently in the sphere of religion (e.g., doctrine, polity, clerics, conditions of church membership). For traditional religions, then, the trade-off is they receive church autonomy—but not governmental support—for their inherently religious beliefs and practices.

This is no Faustian bargain. If traditional Western religions are expected to uphold their end of this bargain, however, secularists must honor their side of the deal. That is why the argument that the "wall of separation" screens out abuses from one side only, see Sherry, *supra* note 465, at 493, 495; *supra* note 360-61 and accompanying text, would have such disastrous consequences. If adherents of traditional religions see that their benefit in the bargain (i.e., *ekklesia* autonomy) is not being realized, then all bets will be off. To be true to the Establishment Clause, the Court must be as zealous about enforcing *ekklesia* autonomy as it is about striking down governmental support for inherently religious practices.

473. At bottom, all claims of neutrality are a mask. See SMITH, *supra* note 50, at 68 ("A different religion or a secular viewpoint will support different background beliefs that logically generate different views or theories of religious freedom."); Garvey, *supra* note 437, at 290-91 (stating that liberalism is not neutral, but makes "assumptions about human nature (the unen-

religion settlement advanced by the allied efforts of the Enlightenment rationalists and Protestant pietists.<sup>474</sup> Accordingly, those who disagree with this constitutional settlement will be aggrieved.<sup>475</sup> The validity of these grievances is beyond the scope of this Article.<sup>476</sup> It suffices here to candidly

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cumbered self, the value of authenticity) that are inconsistent with convictions that many religious people hold"). Professor Smith argues that a truly neutral theory is impossible. I agree. He goes on to assume neutrality is essential to have a modern legal theory. SMITH, *supra* note 50, at 68-71. I disagree. One can have a theory that "takes sides" in the dispute over government-religion relations and still have a theory. One may believe there is a single correct (or, at least better) position and the law should aspire to it. Neutrality is such a theory. Berg, *supra* note 69, at 728. Professor Smith also argues that there is no way of choosing the "better" or "truer" or "preferred" position. SMITH, *supra* note 50, at 71-75. I again disagree. The Court should choose a theory that allows maximum freedom for voluntary religion. What makes it "better" is that it maximizes individual religious choice, safeguards institutional integrity for religious bodies, and minimizes religious factionalism in the body politic. See Berg, *supra* note 69, at 732-34 (arguing that "neutrality" fosters freedom for voluntary religion). To maximize freedom of religious choice is not a good in itself, but freedom is good because then each individual is free to do God's will as he understands his God or gods.

474. See *supra* note 75. Historically the structuralist view was the product of Enlightenment rationalism and Protestant pietism, brought together by compromise and pragmatism. But it is in no sense the inevitable product of pure reason unadulterated by ideological commitment. It does not stand outside of the political and religious milieu from which it emerged. See *supra* note 473. To demand that the structuralist perspective or any other theory of government-religion relations transcend its pedigree and become in some sense substantively "neutral" is to ask the impossible. To call a structuralist view compelling in its fairness and wisdom, or the original intent of the Founders, is valid argument. But to call the view truly "neutral" is at best naïve and at worse a scam.

475. The structuralist church-state boundary will generate differences between the Western tradition as received and later altered in the American colonies and deeply held beliefs of some Americans, secular and religious. John Courtney Murray, of course, is an example of one such grievant. See *supra* notes 101-12 and accompanying text. Murray was instrumental in bringing the Catholic Church *via* Vatican II far in the direction of the American view of individual free exercise, but fell short when it comes to the no-establishment principle. See NOONAN, *supra* note 75, at 331-53.

Polar opposites of Murray, such as Professors Sherry and Sullivan, are also grievants. See Sherry, *supra* note 465, at 483-89 (arguing that rationalism is constitutionally preferred over religion); Sullivan, *supra* note 465, at 197-214, 222 (contending that the First Amendment's negative bar against an establishment of religion implies an affirmative establishment of a secular public order). There are those outside the Western tradition as received in America at its founding, and they are displeased with this location of the church-state boundary. That is cause for sensitivity and (when prudent) accommodation; but it is not a reason to relocate that boundary under the guise of judicial "up dating" of the Establishment Clause. Any judicial shifting of the church-state boundary will just create new grievants, for, again, there is no substantively neutral location for the boundary between church and state.

476. In a review of a recent book by law professor Stephen Feldman, Father Neuhaus duly acknowledges the Western-Protestant bias of the First Amendment, as well as points the way toward how (and how not) to begin to assess these grievances:

[T]rue is the claim that, in American law, the separation of church and state has been interpreted in very Protestant terms, reflecting the individualistic view that religion is a matter of personal decision or preference. Feldman notes that this is not fair to the Jewish understanding of Judaism, and he is right about that. He fails to appreciate the extent to which it is also unfair to the Catholic and Orthodox understanding of Christianity.

acknowledge that a structuralist view is not substantively neutral;<sup>477</sup> indeed, substantive neutrality is impossible because every theory of government-religion relations necessarily takes a position on the nature and contemporary value of organized religion and the purpose and direction of modern government. One positive bias of the structuralist view is that it places a great deal of importance on the autonomy of the religious community (the *ekklesia*). A second affirmative bias is that the view minimizes government's role in influencing the spiritual impulse of humankind (*religare*) by leaving members of the political community (the *civitas*) free to make these choices for themselves.

It is tempting to label the accommodationists and liberal secularists as partisans in the culture war and to characterize the Supreme Court's fixing the government-religion boundary where it does as symbolizing the DMZ between these warring factions. In candor, however, the Supreme Court's position is not a neutral zone either. Its first line of defense is that the Court's government-religion boundary is the original constitutional settlement. It is not to be tampered with by latter-day judge-made law. In the end, however, if the Court's government-religion boundary is to have staying power it has to be defended not because it is neutral or noncontroversial, but because it is good. Indeed, it is a three-fold good: it maximizes individual religious choice, protects the institutional integrity of the *ekklesia*, and minimizes government-induced religious factionalism within the *civitas*.

Under the structuralist settlement, then, the Establishment Clause is not a silver bullet for winning (or ending) the culture war.<sup>478</sup> Although the government-religion boundary policed by the no-establishment principle keeps government from taking sides on confessional and other inherently religious matters, moral and ethical questions are still proper objects of

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Richard John Neuhaus, *On Not Permitting the Other to Be Other*, 79 FIRST THINGS 62 (Jan. 1998) (reviewing STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* (1996)).

477. A structuralist perspective is a formal legal rule, but it is not substantively neutral. See *supra* note 474. If it is objective law-making that is desired, the best a legal system can do is to pick a formal legal rule and then rigorously and dispassionately apply it without regard to the winners and losers in any fact-specific case that should later come before a judge. Such formal rules provide clarity and reduce judicial subjectivity. But the initial choice of a particular formal rule, necessarily rejecting competing rules, is a value-laden judgment that is in no sense substantively "neutral." Professor Laycock labels his position "substantive neutrality." Laycock, *supra* note 259, at 313-52. In the end, however, his view favors minimizing governmental influence over religion so as to avoid distorting private religious choices and commitments. *Id.* at 349. This is not substantively neutral. The view is biased toward one of many possible views on the role of government and the nature and importance of religion. It is a view I share, but it is not neutral.

478. Laycock, *supra* note 259, at 327; see Goldstein, *supra* note 462, at 31 ("A wall that separates church and state is fine; one that separates morality from law isn't.").

legislation. Whose morality will dominate the Republic at any point in time, and hence gets to be reflected in the positive law of the nation, is not predetermined by the Establishment Clause. That determination is left for the making based on who has the more persuasive argument in the marketplace of ideas, as well as the better organizational acumen to promote it.

